85-106

No. 85-

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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NEW YORK COUNCIL ASSOCIATION OF
CIVILIAN TECHNICIANS,
*Petitioner*

v.

FEDERAL LABOR RELATIONS AUTHORITY,
*Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: July 18, 1985

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## QUESTIONS PRESENTED

I. Whether the determination by the Federal Labor Relations Authority that the wearing of a military uniform by civilian technicians employed by the National Guard is a method or means of performing work and a management right under 5 U.S.C. § 7106 (b) (1) is supported by substantial evidence in the record or is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

II. Whether the Federal Labor Relations Authority may restrict subjects of mandatory bargaining for Federal employees by an expansive interpretation of the Labor-Management provisions of the Civil Service Reform Act of 1978 at odds with articulated Congressional intent regarding the scope of such bargaining.

III. Whether the Federal Labor Relations Authority failed to develop a record appropriate for judicial review in accordance with 5 U.S.C. § 7118 (a) (6), 5 U.S.C. § 706 (2) (D) and the Court of Appeals' Order in *State of New York, Division of Military and Naval Affairs v. Federal Labor Relations Authority*, 696 F.2d 202 (2d Cir. 1982).

IV. Whether the Federal Labor Relations Authority failed to make appropriate findings of fact in accordance with 5 U.S.C. § 7118 (a) (8).

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IN THE

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No. 85-

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NEW YORK COUNCIL ASSOCIATION OF CIVILIAN TECHNICIANS,
*Petitioner*

v.

FEDERAL LABOR RELATIONS AUTHORITY,
*Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

The New York Council Association of Civilian Technicians, Petitioners and Appellants below hereby petition this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the judgment in *New York Council Association of Civilian Technicians v. Federal Labor Relations Authority*, 757 F.2d 502 (2d Cir. 1985), rehearing denied April 19, 1985.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 757 F.2d 502 and is reprinted at pages 1a-19a of the Appendix (hereinafter

"App.") to this Petition. The Second Circuit's Order denying rehearing is reprinted at App. 20a-21a. The Decision and Order of the Federal Labor Relations Authority is reported at 15 FLRA No. 65 and is reprinted at App. 22a-35a. An earlier Order of the Second Circuit remanding the case to the Federal Labor Relations Authority is reported at 696 F.2d 202 and is reprinted at App. 36a-41a and the remanded Decision and Order of the Federal Labor Relations Authority is reported at 8 FLRA No. 33 and is reprinted at App. 42a-49a.

## JURISDICTION

The Opinion and Order of the United States Court of Appeals for the Second Circuit were issued on March 14, 1985. Petitioners filed a timely Motion for Rehearing which was denied on April 19, 1985. This Court's jurisdiction is invoked pursuant to 5 U.S.C. § 7123 (c) and 28 U.S.C. § 1254.

## STATUTORY PROVISIONS INVOLVED

The following statutory provisions are appended as follows:

Provisions of the Civil Service Reform Act of 1978, P.L. 95-454, Title VII, § 701, et seq. (October 13, 1978):

5 U.S.C. § 7103 (a)(14) defining the term "conditions of employment" (92 Stat. 1192) (App. 98a).

5 U.S.C. § 7106 setting forth managements rights (92 Stat. 1198) (App. 98a).

5 U.S.C. § 7118 providing for the prevention of unfair labor practices (92 Stat. 1207) (App. 99a).

National Guard Technicians Act of 1968, P.L. No. 90-486, 82 Stat. 755, 32 U.S.C. § 709 providing for the employment of National Guard Technicians (App. 103a).

## STATEMENT OF THE CASE

### A. The Facts

The Adjutant General of the State of New York administers the hiring of federal civilian employees known as "technicians" for the National Guard pursuant to the National Guard Technician Act of 1968, P.L. No. 90-486, 82 Stat. 755, 32 U.S.C. § 709. (Supp. 1984) (hereinafter "Technicians Act"). In the State of New York the technician program employs Army National Guard technicians and air technicians in such positions as supply electronics mechanic, sheet metal mechanic, and supply technician. The New York Council, Association of Civilian Technicians, Inc. (Union) became the certified collective bargaining representative for these employees on May 26, 1970, pursuant to Execlutive Order 11491, as amended (5 U.S.C. § 7101 Note). Although employed by the "Adjutant General" of the State of New York the technicians are employees of the Department of the Army or the Department of the Air Force as the case may be and employees of the United States. 32 U.S.C. § 709 (c) and (d).

The overall mission of the National Guard is to provide units of trained, qualified and equipped personnel for mobilization in time of war, national emergency, or civil disruption. At the time this dispute arose there were employed by the New York National Guard 1,317 civilian technicians assigned to the Army National Guard and 1,043 civilian technicians assigned to the Air National Guard. These civilian employees are, by statute, required to maintain their membership in the National Guard as a condition of their employment 32 U.S.C. § 709 (e)(1) (App. 103a). Nevertheless, they make up only 10.7% of the State of New York's military guard membership. The balance of the National Guard's military reserve force are civilians who, on a daily basis, are employed in all walks of life; bank clerks, store clerks, and civilian employees of the federal, state and local

governments. Both the store clerks and civilian technicians meet together as military members of the National Guard at weekend assemblies and summer encampments. During the work week, however, civilian technicians are employed as, *inter alia*, aircraft mechanics, sheet metal mechanics, auto mechanics, electronics mechanics, machinists and supply technicians. As civilian federal employees technicians are assigned wage grades, receive fringe benefits and negotiate labor agreements as do other civilian employees of the federal government. Indeed, their daily functions closely resemble work performed by other federal civilian employees who work for the Department of Defense. Technicians while performing their civilian duties are not subject to the Uniform Code of Military Justice, but may only be discharged for "cause." 32 U.S.C. § 709 (e) (3) (App. 104a).

Air National Guard technicians in New York State have always worn a military uniform while engaged in their daily work, while prior to 1972, New York's Army technicians wore various types of civilian attire while performing their day to day job functions. Prior to September 5, 1972, existing regulations permitted the Adjutant Generals of the various states to allow civilian attire among the technician work force. From 1960 to 1972 the wearing of civilian attire by Army technicians in New York had no impact on unit readiness or discipline.

In March of 1971, ACT and the New York National Guard began negotiations for their first collective bargaining agreement. The employer proposed that all technicians wear the military uniform while the union sought to permit all technicians to wear civilian attire. With negotiations in progress the Chief of Staff, New York National Guard issued a directive ordering all technicians to wear their uniform while in civilian status. The National Guard then declared the Union's uniform proposal non-negotiable on September 27, 1972. The National Guard's position on the uniform issue generated both an

unfair labor practice charge and an appeal to the Federal Service Impasses Panel on the issue of non-negotiability. While these appeals were pending the parties concluded their negotiations without agreeing to language on the uniform issue, however, they agreed to reopen the negotiations on this issue. In 1973, the Illinois National Guard negotiated a civilian attire clause with the Union's Illinois Chapter and by the time of the Impasses Panel hearing three other states, Massachusetts, Montana, and Michigan, also had collective bargaining agreements that permitted civilian attire. By the time the Federal Labor Relations Authority requested position statements in this matter at least sixty (60) Army and Air National Guard units had collectively bargained the right to wear civilian attire.

On January 19, 1977, the Federal Labor Relations Council ruled that the uniform issue was negotiable. *National Association of Government Employees, Local No. R14-87 and Kansas National Guard* FLRC No. 76A-16 (and other cases consolidated therewith (January 19, 1977), Report No. 120; and *National Federation of Federal Employee, Local 1636 and State of New Mexico National Guard*, FLRC No. 76A-75 (and other cases consolidated therewith) (January 19, 1977), Report No. 120, Request for Reconsideration denied (May 18, 1977), Report No. 125. The Department of Defense argued that the right to compel technicians to wear the military uniform was a reserved management right under Section 12 (b) (5) of Executive Order 11491 permitting the Employer to determine the "means" by which the agency accomplishes its operations. Section 12 (b) (5) provides:

> (b) Management officials of the agency retain the right, in accordance with applicable laws and regulations
>
> * * * *
>
> to determine the methods, means, and personnel by which such operations are to be conducted. 5 U.S.C. § 7101 (Note)

Noting that the Federal Labor Relations Council considered this issue in its decision the Federal Labor Relations Council rejected the broad argument that Section 12 (b) (5) forbids all negotiations over uniforms and left to "particular instances of assigned technician duties" the question of whether Section 12 (b) (5) might apply on a case by case basis. On August 16, 1977, the Assistant Secretary of Defense acknowledged that the uniform issue was negotiable under Section 12 (b) (5) except where on a case by case basis when there might be "limited circumstances" bringing the issue within the Section 12 (b) (5) exception.

The Association of Civilian Technicians and the National Guard thereafter began negotiations for a new labor agreement. On March 27, 1978, the Association of Civilian Technicians filed a request with the Federal Service Impasses Panel. It is from the Order of that Panel, and subsequent unfair labor practices, that this appeal arises.

**B. Procedural History**

On March 27, 1978, the Union filed a request with the Federal Service Impasse Panel (Panel) asking the Panel to resolve a negotiations dispute between the Union and the Adjutant General relating to, *inter alia*, whether civilian technicians may wear civilian clothing when performing their civilian technician duties. The Panel conducted a fact-finding hearing on June 7 and 8, 1978. On September 28, 1978, the Panel submitted its Panel Report and Recommendations for Settlement, finding that the Union and the Adjutant General should adopt language in their labor agreement permitting civilian technicians the option of wearing civilian attire (App. 76a). The National Guard rejected the recommendation and on January 9, 1979, the Panel issued its Decision and Order in Case No. 78 FSIP 32 ordering the Adjutant General to implement the Panels earlier recommendation (App. 70a). The Adjutant General sought reconsideration

from the Federal Labor Relations Authority which was denied. Still, the Adjutant General refused to implement the Order of the Panel.

On March 15, 1979, the Union filed a charge of unfair labor practices with the Federal Labor Relations Authority against the Adjutant General alleging a violation of Sections 7116 (a) (1) and (6) of the Labor-Management Act, 5 U.S.C. § 7116 (a) (1) and (6). On October 17, 1979, the General Counsel of the Federal Labor Relations Authority issued a Complaint averring that the Adjutant General had committed an unfair labor practice by refusing to implement the Order of the Panel. In its Answer to the Complaint the National Guard averred that it was not obligated to bargain over the wearing of civilian attire because it was a management right under Section 12 (b) (5) of Executive Order 11491. On February 19, 1982, the Federal Labor Relations Authority issued its Decision and Order in 8 FLRA No. 33 (App. 42a) finding that the Adjutant General did commit an unfair labor practice by refusing to implement the Order of the Panel, relying on its previous decision in *State of Nevada National Guard and NAGE*, 7 FLRA No. 37 (Nov. 19, 1981). The Federal Labor Relations Authority did not address the management's rights issue. The National Guard appealed to the Second Circuit Court of Appeals from the final Order. On December 10, 1982, the Second Circuit remanded the matter to the Federal Labor Relations Authority to develop a full record appropriate for judicial review as to whether the uniform issue was non-negotiable under Section 7106 (b) of the Labor-Management Act. *State of New York v. Federal Labor Relations Authority*, 696 F.2d 202, 205 (2d Cir. 1982) (App. 36a).

On March 17, 1983, the Federal Labor Relations Authority issued a notice of reopened proceedings and requested the parties to submit position statements on whether the uniform issue was non-negotiable under Sec-

tion 7106 (b) (1) of the Labor-Management Act. Each of the parties, General Counsel to the Federal Labor Relations Authority, New York State Council Association of Civilian Technicians and the National Guard, submitted position statements. In addition, the National Guard requested an evidentiary hearing on the issue raised by the remand.

The Federal Labor Relations Authority held no hearing and took no evidence, but rendered its Decision and Order upon Remand finding the uniform issue to be a permissive rather than mandatory subject of bargaining. Original jurisdiction of this matter was to the United States Court of Appeals for the Second Circuit pursuant to 5 U.S.C. § 7123.

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE PRESENTS SERIOUS QUESTIONS NOT PREVIOUSLY DECIDED BY THIS COURT REGARDING THE SCOPE OF PERMISSIVE VERSUS MANDATORY BARGAINING FOR FEDERAL EMPLOYEES WHO ARE CIVILIAN EMPLOYEES OF THE STATE NATIONAL GUARDS UNDER THE LABOR-MANAGEMENT PROVISIONS OF THE CIVIL SERVICE REFORM ACT OF 1978.

At issue is whether the National Guard may be required to bargain collectively over a civilian attire clause in its labor agreement with the technicians' representative. The Federal Labor Relations Authority made an erroneous determination that the civilian attire issue was only a permissive subject of bargaining under 5 U.S.C. § 7106 (b) (1). In determining that military uniforms were a "means" by which the National Guard performed its work, the Federal Labor Relations Authority utilized an incorrect construction of the Labor-Management Act completely at odds with the construction of the statute given by Congress at the time it was enacted. The management's rights clause cited is to be narrowly construed so as to favor negotiability where there is any ambiguity.

Further, Congress intended the phrase "methods and means of performing the work" to encompass only general policy questions determining how an agency does its work. The Federal Labor Relations Authority's interpretation of what constitutes a means of performing the work is so broad that this narrow exception to the mandatory requirement of bargaining over conditions of employment swallows the general obligation. This broad construction is arbitrary, capricious and in disregard of the law.

The Federal Labor Relations Authority argued strenuously for judicial deference in its interpretation of the Labor Management Act. However, the Authority largely ignored the fact that the current statute represented an iteration of Executive Order 11491.

> (Mr. Udall)
>
> "What we really do is to codify the 1962 action of President Kennedy in setting up a basic frame-work of collective bargaining for Federal employees. This was good enough and acceptable enough to all segments of our society that it was left unchanged during the eight years of the Nixon and Ford administration.

*Legislative History of the Federal Services Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, Committee Print No. 96-7 Post Office and Civil Service Committee HR No. 19 (1978) at p. 923. (Reprint).

That Executive Order, as did Regulation 2026, contained within its scheme the concept of non-negotiability over the "methods and means of performing the agency's work." See Section 12 (b) (5) of Executive Order 11491, 5 U.S.C. § 7101, Historical Note. And in interpreting that Executive Order the Federal Labor Relations Council was not convinced that the uniform requirement was a method or means needed for the National Guard Bureau to per-

form its work. *State of Ohio Air National Guard*, 6 FLRA 704 (1978); *Kansas National Guard*, 5 FLRA 124 (1977).

The Legislative History establishes that Congress did not intend to abandon years of Federal Labor Relations Council interpretation respecting the meaning of the phrase "means of performing the work" and substitute a dictionary definition that undermines that broad concept of negotiability contained in the Statute.

In creating the current Labor-Management statute Congress did not write upon an entirely clean slate. Yet, the Federal Labor Relations Authority has suddenly chosen to ignore Federal Labor Relations Council precedent in favor of a definition of "means of performing the work" that comes solely from the dictionary. The Authority holds that "a means" is in essence anything used to attain or make more likely the attainment of a desired end" and refers to "any instrumentality, including an agent, tool, devise, measure, plan, or policy used by the agency for accomplishing or furthering of the performance of its work." Taken to its logical conclusion their definition renders every condition of employment subject to permissive rather than mandatory bargaining.

It establishes no standard by which the Authority can separate trivial and mundane working conditions from those that impact seriously and crucially on the mission of an agency. By broadly expanding the concept of "methods and means" the Federal Labor Relations Authority has taken the tack expressly rejected by the framers of the Legislation. In so ruling, the Federal Labor Relations Authority's interpretation of the statute is neither reasonable nor plausible to stand as governing law, and it's inadequate, irrational and arbitrary. *National Labor Relations Board v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

The Court below believed that this broad reading of the Act was "saved" by the Federal Labor Relations Au-

thority's qualification that the "means" have a "direct and integral" relationship with the Agency's mission (App. 13a). Nevertheless, the Court rejected the earlier Impasse decision that found no "functional relationship" between the uniform requirement and the Agency's mission. Instead, it adopted a rational relationship test that was essentially imported from a Fourteenth Amendment analysis. The Act itself does not define the terms "method" or means". They were given some consideration in the Conference Report 95-1717 accompanying the agreements between the Senate and House Managers of the bill. The report states:

> By inclusion of this language [permitting negotiations on methods and means], however, it is not intended that agencies will discuss *general policy questions determining how an agency does its work* . . . . For example, the phrase "method and means" is not intended to authorize IRS to negotiate with a labor organization over how returns should be selected for audit, or how thorough the audit of the returns should be. It does not subject to the collective bargaining agreement the judgment of EPA about how to select recipients for the award of environmental grants. It does not authorize the Energy Department to negotiate with unions on which of the research and development projects being conducted by the Department should receive top priority as part of the Department's efforts to find new sources of energy. H. Rept. No. 95-1717, 95th Congress, 2d Session (October 5, 1978) at 154; Reprint at 822 see also S. Report No. 95-1271 (1978), 124 Cong. R.H. 11624 (Daily Ed. Oct. 5, 1978) (emphasis supplied).

General policy considerations aside, Section 7106 (b) (1) is therefore to be considered as a narrow exception to the broader right of employee unions to negotiate over conditions of employment. As a narrow exception, the phrase "methods and means of performing work" must itself be given a limited meaning lest it swallow up in its ambiguity "almost anything worth bargaining about."

The appropriate construction to be given "methods and means" is one that makes permissive negotiations over "general policy questions determining how an agency does its work." Such general policy questions may logically be considered as "rights" explicitly or by unambiguous implication vested in management by the terms of the Labor-Management Act or by provisions of the Technicians Act. *American Federation of Government Employees v. Federal Labor Relations Authority*, 712 F.2d 640, 646 n. 27 (D.C. Cir. 1983). All other conditions of employment that do not implicate a general policy over how the work shall be done must be labeled mandatory subjects of negotiation. *Id.* The examples of "method and means" noted by the Committee sponsors of the bill support a construction that favors broad negotiation over conditions of employment limited only where the right of management to pursue its mission may be affected by the negotiations. Clearly, the uniform issue under consideration herein does not rise to the level of such a method or means of performing the National Guard's work that it need be labeled a permissive subject of bargaining.

It is submitted that the Federal Labor Relations Authority has arbitrarily and capriciously defined the phrase "methods and means," relying on *United States Customs Service, Region VIII*, 2 FLRA 255 (1979), to make permissive, mandatory subjects of bargaining.

## II. THE FEDERAL LABOR RELATIONS AUTHORITY FAILED TO CONDUCT AN EVIDENTIARY HEARING AS REQUIRED BY THE SECOND CIRCUIT'S EARLIER REMAND ORDER AND FAILED TO MAKE APPROPRIATE FINDINGS OF FACT AS REQUIRED BY STATUTE.

The Federal Labor Relations Authority's Decision discusses no evidence and makes no factual findings. (App. 22a). Although at pages 24a and 26a it refers to a "record" before the Authority it does not disclose what

that record might be—other than the position statement of the National Guard Bureau.

5 U.S.C. § 7118 (a) (8) provides:

> If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

In lieu of a reasoned, factual analysis the Authority substitutes conclusory rationales drawn from unrelated cases. Such absence of relevant factual analysis cannot justify the Authority's Decision and Order. *National Labor Relations Board v. Yeshiva University*, 444 U.S. 672, 691, 100 S.Ct. 856, 867 (1980).

The National Labor Relations Board's failure to conduct a hearing, make factual findings and explain factually the basis for its conclusions constitutes an arbitrary and capricious determination in violation of the Board's obligations imposed by law. *National Labor Relations Board v. General Stencils, Inc.*, 438 F.2d 984 (2d Cir. 1971); *National Labor Relations Board v. Mercy College*, 536 F.2d 544 (2d Cir. 1976); *Mercy Hospital of Buffalo v. National Labor Relations Board*, 668 F.2d 661 (2d Cir. 1982). *National Labor Relations Board v. Armcor Industries, Inc.*, 535 F.2d 239, 245 (3rd Cir. 1976). These principles apply equally to decisions of the Federal Labor Relations Authority, 5 U.S.C. § 7118 (a) (8); 5 U.S.C. § 7106; 5 U.S.C. § 7123 (c); *Library of Congress v. Federal Labor Relations Authority*, 699 F.2d 1280, 1284 (D.C. Cir. 1983). This is especially true where the agency reverses course and renders a decision contrary to earlier authority. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n. 5 (1978); *Skidmore v. Swift and Co.*, 323 U.S. 134, 140 (1944).

## CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 18, 1985

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**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 555—August Term, 1984

(Argued: January 18, 1985 Decided: March 14, 1985)

Docket No. 84-4128

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NEW YORK COUNCIL, ASSOCIATION OF CIVILIAN TECHNICIANS,
*Petitioner*,

*—against—*

FEDERAL LABOR RELATIONS AUTHORITY,
*Respondent.*

---

STATE OF NEW YORK, DIVISION OF MILITARY AND NAVAL AFFAIRS, and UNITED STATES DEPARTMENT OF DEFENSE,
*Intervenors.*

---

Before:

OAKES, CARDAMONE and PIERCE, *Circuit Judges*

---

The New York Council, Association of Civilian Technicians petitions to set aside an order of the Federal Labor Relations Authority which dismissed a complaint brought against the Division of Military and Naval Affairs, State of New York, for its refusal to include a pro-

vision in collective bargaining that would permit its civilian technicians to wear civilian attire while at work.

Petition for review denied.

---

BRUCE E. ENDY, Philadelphia, Pennsylvania (Bernard N. Katz, Spear, Wilderman, Sigmond, Borish, Endy and Silverstein, Philadelphia, Pennsylvania, of counsel) *for Petitioner.*

WILLIAM R. TOBEY, Washington, D.C. (Ruth E. Peters, Steven H. Svartz, William E. Persina, Washington, D.C., of counsel) *for Respondent.*

MARC RICHMAN, Washington, D.C. (Richard K. Willard, Acting Assistant Attorney General, William Kanter, James C. Hise, Joseph R. Reyna, Washington, D.C., of counsel) *for Intervenors*

H. STEPHAN GORDON, Washington, D.C. (Clinton D. Wolcott, Washington, D.C., of counsel) *for National Federation of Federal Employees, as Amicus Curiae.*

WILLIAM J. STONE, Washington, D.C. (Charles A. Hobbie, Mark D. Roth, Washington, D.C., of counsel) *for American Federation of Government Employees, AFL-CIO, as Amicus Curiae.*

---

CARDAMONE, *Circuit Judge*:

Apparently giving the maximum "apparel oft proclaims the man" [1] the force of law, the Federal Labor Relations Authority has found that the New York National Guard may require its civilian technicians to be clothed in military dress. Resolution of the issue hinges

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[1] W. Shakespeare, *Hamlet*, Act I, scene iii, reprinted in *Complete Works of William Shakespeare* (W. Craig ed. 1928).

on whether the technicians' attire is subject to mandatory bargaining or whether the wearing of uniforms is a "means" by which the Guard performs its mission and therefore is nonnegotiable. A previous decision of the Federal Labor Relations Authority was remanded because it had failed to address the "means" objection to negotiability. *State of New York, Division of Military and Naval Affairs* v. *FLRA*, 696 F.2d 202, 205 (2d Cir. 1982). In its decision and order on remand, now before us on this appeal, the Authority disregarded the rule established by its predecessor that civilian attire is nonnegotiable only when it is shown that a functional relationship exists between the wearing of a uniform and the performance of the technicians' duties. The Authority also disregarded the factual findings of the Federal Service Impasses Panel that the Guard had not demonstrated such a link between the "means" and the accomplishment of the Guard's mission. Nevertheless, we believe the Authority has given a reasoned explanation for its decision that does not contravene Congressional purpose. In this regard, it must be emphasized that the Authority was intended to take an independent approach to federal labor relations and was not to be bound—or even necessarily influenced—by its predecessor, the Federal Labor Relations Council. Here, we deny the petition for review.

## I

## FACTUAL BACKGROUND

The New York Council, Association of Civilian Technicians ("Union") petitions to set aside an order of the Federal Labor Relations Authority ("FLRA" or "Authority") reported as *Division of Military and Naval Affairs, State of New York, Albany, New York*, 15 FLRA No. 65 (1984). The order and opinion dismissed a complaint brought against the Division of Military and Naval Affairs, State of New York ("New York National Guard" or "Guard") for its refusal to comply with an order of

the Federal Service Impasses Panel ("FSIP" or "Panel") that required the Guard to include a collective bargaining provision permitting its civilian technicians to wear civilian attire. The Authority found the issue to be beyond the scope of required bargaining. The New York National Guard and the Department of Defense have intervened and the American Federation of Government Employees, AFL-CIO, and the National Federation of Federal Employees have filed amicus curiae briefs. We have jurisdiction pursuant to Section 701(a) of the Civil Service Reform Act of 1978, 5 U.S.C. § 7123(a) (1982). Title VII of the Civil Service Reform Act of 1978 is codified as the Federal Service Labor-Management Relations Act (Labor Management Act), 5 U.S.C. §§ 7101 *et seq.*

The Guard's misison is to provide trained personnel for mobilization in time of war, national emergency or civil disruption. The Adjutant General in each state—in New York the Chief of Staff to the Governor holds the position, but not the title—administers the hiring of civilian technicians, who are employed as aircraft mechanics, sheet metal mechanics, auto mechanics, electronic mechanics, machinists and supply technicians. They have been said to constitute the "backbone" of the Guard and are the only personnel on duty for much of the year. *Maryland* v. *United States*, 381 U.S. 41, 49, *vacated on other grounds*, 382 U.S. 159 (1965). The technicians have federal civilian employee status under the National Guard Technicians Act of 1968, 32 U.S.C. § 709 (1982), and as such are assigned wage grades, receive fringe benefits, negotiate labor agreements, and may only be discharged for "cause." *See generally AFGE Local 2953* v. *FLRA*, 730 F.2d 1534 (D.C. Cir. 1984) (discussing status of technicians under Technicians Act). As a condition of employment, these employees must be members in the Guard and attend four training assemblies each month and a two-week encampment each year. Air National Guard technicians in New York have always worn

uniforms, but prior to 1972 Army Guard technicians did not.

The Union became the certified collective bargaining representative of all Army and Air National Guard technicians employed by the New York National Guard in 1970. In 1978, the Union filed a request with the FSIP asking it to resolve a dispute between it and the Adjutant General that related in part to the question of whether civilian technicians may wear civilian clothing when performing their civilian technician duties. The reason for the request was that National Guard Bureau regulations and the New York Adjutant General's directives required the technicians to wear uniforms even while performing civilian duties. The NGB regulation at issue reads:

> Technicians in the excepted service will wear the military uniform appropriate to their service and federally recognized grade when performing technician duties and will comply with standards of the appropriate service pertaining to grooming and wearing of the military uniform.

After a hearing, the Panel recommended that the Union and the Adjutant General adopt language in their collective bargaining agreement that would provide civilian technicians "the option of wearing either the military uniform[] or an agreed-upon standard civilian attire without displaying military rank." The provision was subject to agreed-upon exceptions specifying circumstances under which uniforms could be required.

When the Guard rejected the recommendation, the Panel ordered the Adjutant General to implement it. No. 78 FSIU 32. The FLRA denied the Adjutant General's petition for reconsideration of the Panel's decision. The Adjutant General nonetheless continued its refusal to comply with the Panel's order. The Union therefore filed unfair labor practice charges, alleging a violation of

§ 7116(a)(1) and (6) of the Labor Management Act. When the Authority's General Counsel issued a complaint, the Guard claimed that it was not obligated to bargain over the uniform issue because it was a management right under § 12(b)(5)[2] of Executive Order No. 11491, which at the time governed the labor relations of federal employees. The Authority agreed with the Administrative Law Judge and found that the Adjutant General had committed an unfair labor practice by refusing to comply with the Panel's order. It relied on its earlier decision in *State of Nevada National Guard*, 7 FLRA No. 37 (1981), in which it had held that the FSIP order concerning the uniform issue was not contrary to the United States Constitution or the Technicians Act, and that the Guard had demonstrated no "compelling need" for requiring uniforms.

The Guard appealed and we remanded the matter to the Authority "to develop a full record appropriate for judicial review as to whether the attire the technicians should wear while engaged in their daily duties as civilians is a non-negotiable matter under Section 7106(b)" of the Labor Management Act.[3] *State of New York* v. *FLRA*, 696 F.2d at 205. We noted that *State of Nevada National Guard* had not addressed the issue, and that it

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[2] Section 12(b)(5) of Executive Order No. 11491 reads:

> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations—
>
> . . . .
>
> (5) to determine the methods, means, and personnel by which such operations are to be conducted.

5 U.S.C. 7101 note.

[3] Section 7106(b)(1) provides in pertinent part that

> nothing in this section shall preclude any agency and any labor organization from negotiating—
>
> (1) at the election of the agency, on the . . . methods, and means of performing.

5 U.S.C. § 7106(b)(1).

had been properly raised in the instant proceeding. *Id.* In March 1983, the Authority issued a notice of reopened proceedings and requested the parties to submit statements on whether the uniform issue was nonnegotiable under § 7106(b)(1). The Authority's General Counsel, the Union, and the Guard each submitted statements. The Guard attached affidavits of various State Adjutant Generals and requested an evidentiary hearing. The Authority denied that request. By the time the Authority requested these position statements, 60 Army and Air National Guard units had collectively bargained for the right to wear civilian attire. In its decision after remand, the Authority held that the uniform requirement was negotiable only at the election of the Guard as a "methods, and means of performing work" under § 7106(b)(1) because permitting civilian attire would directly interfere with the performance of the technicians' duties in furtherance of the Guard's mission. By so holding, the Authority changed the interpretation of the 'methods and means" language in § 7106(b)(1) as it applies to the uniform question. The Authority's predecessor, the Federal Labor Relations Council ("FLRC" or "Council"), had required a "functional relationship" between the wearing of a uniform and accomplishment of the Guard's mission.

The Unions and amici now petition to have that the Authority's decision set aside on three grounds. They claim it was contrary to law, arbitrary and capricious, and unsupported by substantial evidence. First, they contend that the decision contravenes the clear aim of Congress that the management rights provision be a narrow exception to the duty to bargain. Second, they assert that the FLRA's decision is an unexplained departure from the precedent of its predecessor, and is therefore arbitrary and capricious.[4] Finally, they argue

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[4] The National Federation of Federal Employees contends that the Authority's decision is also contrary to its own precedent,

that the Authority failed to use the procedures required by the remand order and by the Administrative Procedure Act, failed to articulate the factual findings underlying its conclusions, and reached a conclusion that lacks the support of substantial evidence in the record. We address each contention in turn.

## II

## Scope of Review

Section 7123(c) of the Labor Management Act provides that decisions of the Authority are subject to judicial review in accordance with the Administrative Procedure Act. 5 U.S.C. § 7123(c). Therefore, FLRA decisions and orders that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), must be set aside. To analyze the question requires us to engage in two distinct tasks. We must first decide whether the Authority has acted within its delegated authority—that is, whether the choice it has made was one entrusted to it by Congress. And then assuming such is the case, we must decide whether its rule is the product of reasoned decisionmaking. *See Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413, 1422 (D.C. Cir. 1983).

### A. *Delegated Authority*

In its first consideration of an FLRA interpretation of the Civil Service Reform Act, the Supreme Court recently explained:

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citing *State of Nevada National Guard.* But as noted in our previous decision, that case did not address the management rights issue. The finding that there was no "compelling need" for the regulation related to a separate challenge based on the requirement that a local regulation be essential to the accomplishment of the Guard's mission before it can be found nonnegotiable. *See* 5 U.S.C. § 7717.

> Like the National Labor Relations Board, the FLRA was intended to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Act. Consequenty, the Authority is entitled to considerable deference when it exercises its "special function of applying the general provisions of the Act to the complexities" of federal labor relations.
>
> On the other hand, the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

*Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 104 S. Ct. 439, 444 (1983) (citations omitted).

B. *Reasoned Decision-Making*

In *Motor Vehicle Manufacturers Assoc.* v. *State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983), the Supreme Court emphasized that when an agency follows a settled course, its signals that in its view by pursuing that course it is carrying out the Congressional mandate, and that by adhering to the settled path it best carries out Congressional policy. *Id.* at 2866. Thus, when an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act. *Public Citizen* v. *Steed*, 733 F.2d 93, 99 (D.C. Cir. 1984). In addition, the agency

must consider reasonably obvious alternatives and, if it rejects those alternatives, it must give reasons for the rejection, sufficient to allow for meaningful judicial review. *Id.* Although there is not a "heightened standard of scrutiny . . . *the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.*" *Brae Corp.* v. *United States*, 740 F.2d 1023, 1038 (D.C. Cir. 1984) (emphasis added). Even in the absence of cumulative experience, changed circumstances or judicial criticism, an agency is free to change course after reweighing the competing statutory policies. But such a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule. *Office of Communication of United Church of Christ* v. *FCC*, 560 F.2d 529, 532 (2d Cir. 1977).

The Court explained in *State Farm* that it would not be "reasonable," nor would it demonstrate fidelity to the statutory mandate, for an agency to make a change not justified by the record. 103 S. Ct. at 2866. Although recognizing that the scope of judicial review under the arbitrary and capricious standard is narrow, a reviewing court must be certain that an agency has considered all the important aspects of the issue and articulated a "satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Id.* at 2866-67. An agency will have acted arbitrarily if it has: (1) relied on factors that Congress did not want it to consider; (2) failed to consider an important aspect of the problem; (3) given an explanation for its decision that is contrary to the evidence before it; or (4) given an explanation so implausible that it cannot be ascribed to any view of the facts or to agency expertise. *Id.* at 2867. With these principles of review in mind, we consider the legislative history and the Authority's decision.

## III

### LEGISLATIVE HISTORY

The labor relations of federal employees are now regulated by Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101 *et seq.*, which requires agencies to bargain with their employees over the conditions of employment, subject only to express statutory exceptions. *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983). This appeal involves the "management right" to avoid mandatory bargaining over the "technology, methods, and means of performing work." 5 U.S.C. § 7106(b)(1). An agency may elect to bargain over these matters, but it need not. The legislative history of the Labor Management Act makes clear that § 7106 is a narrow exception to the right to bargain over working conditions. Congress intended § 7106(a) to expand the scope of bargaining that had existed under Section 12 (b)(5) of Executive Order No. 11491 and FLRC precedent. *See, e.g.*, 124 Cong. Rec. 29198 (1978) (remarks of Rep. Ford), *reprinted in* Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 954 (1978) (hereinafter cited as *Legislative History*); *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553, 559 & n.62 (D.C. Cir. 1982). Therefore, "section 7106—which retains several of management's rights under the Executive Order, but also eliminates several—[is to] be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal." H. Rep. No. 1403, 95th Cong., 2d Sess. 44 (1978), *reprinted in Legislative History, supra*, at 690.

The Union and amici argue that the terms "technology" and "methods and means of performing work"

in the Labor Management Act were taken from the language of Executive Order No. 11491. The Union concedes that the Authority is not precluded from altering interpretations made by its predecessor, the FLRC, but it claims that there is a clear statement by Congress that interpretations by the FLRC should be respected when the Labor Management Act parallels the Executive Order. The Union correctly contends that usually when Congress adopts a new law that incorporates sections of a prior law, it is presumed to be aware of administrative interpretations of that law and to adopt those interpretations; when Congress re-enacts a statute that has a longstanding administrative interpretation, that re-enactment may well ratify the interpretation. *See Lorillard* v. *Pons*, 434 U.S. 575 (1978). The Union also argues that § 7135(b), which provides that "decisions issued under Executive Order 11491 . . . shall remain in full force and effect . . . unless superseded by specific provisions of this chapter," reinforces the continued applicability of the Council's interpretations of the Executive Order.

We do not read § 7135(b) to prevent the Authority, as successor to the Council, from formulating its own construction of the Act. *See National Treasury Employees Union*, 691 F.2d at 562-63 n.89 ("[w]e discern in this language no impediment to changed statutory interpretations by the Authority"). Instead, the legislative history suggests that Congress did not intend § 7135(b) to shackle the Authority, but simply to assure continuity until the Authority developed its own body of interpretive law under the new statute. *See id.; Department of Defense* v. *FLRA*, 659 F.2d 1140, 1163 (D.C. Cir. 1981). Given the lack of controlling effect of the Council's decisions and absent more specific legislative history on the uniform requirement, we are bound by this Congressional purpose. The duty to determine the bargainable nature of issues arising under the Labor Management Act rests squarely on the shoulders of the Authority, not the courts. *See National Treasury Employees Union*, 691 F.2d at 561.

Although the Authority's determination that the uniform requirement is nonnegotiable is entitled to considerable deference because the administrative body has the expertise and the authority to apply the broad language of § 7106 to questions of negotiability, the Authority's interpretation of the phrase "means" is not premised on an understanding of industrial complexities but instead relies on Webster. The all-important qualification put on its literal definition of means is that there be a "direct and integral" relationship between the means and the agency's mission. Because of this qualification, the Authority's interpretation does not conflict with the acknowledged view that § 7106 creates a narrow exception to the duty to bargain over the terms and conditions of employment. Having determined that the Authority acted within its delegated authority, we next consider whether its rule is the product of reasoned decision-making.

## IV

## THE AUTHORITY'S DECISION

On remand the Authority found that the requirement "that technicians must wear the military uniform while performing technician duties constitutes management's choice of a 'methods, and means of performing work' within the meaning of section 7106(b)(1) of the Statute." *Division of Military and Naval Affairs*, 15 FLRA No. 65, at 7. Quoting *National Treasury Employees Union*, 2 FLRA No. 30 (1979), the Authority found that "a 'means' is in essence anything used to attain or make more likely the attainment of a desired end, and in the context of section 7106(b)(1), refers to 'any instrumentality, including an agent, tool, device, measure, plan, or policy used by the agency for the accomplishing or furthering of the performance of its work.'" 15 FLRA No. 65, at 4. The FLRA focused on the fact that technicians performed their duties in a military framework, and noted that the legislative history shows that in addi-

tion to full-time civilian work, technicians are also bound by military obligations and duties, and are available for state or federal mobilization. *See* H. Rep. No. 1823, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. Code Cong. & Ad. News 3318, 3319. It recognized the several court decisions that had found a rational relationship between National Guard attire and its functioning as a military organization. *See, e.g., Klothbach* v. *Callaway*, 473 F. Supp. 1337 (W.D.N.Y. 1979); *Syrek* v. *Pennsylvania Air National Guard*, 437 F. Supp. 236 (W.D. Pa. 1977); *Bruton* v. *Schnipke*, 404 F. Supp. 1032 (E.D. Mich. 1975). Moreover, it specifically found the requirement served "to foster military discipline, promote uniformity, encourage *esprit de corps*, increase the readiness of the military forces for early deployment and enhance identification of the National Guard as a military organization." 15 FLRA No. 65, at 6.

As noted, the Council had previously required a "functional relationship" between the wearing of a uniform and the accomplishment of the Guard's mission. *See Kansas National Guard*, 5 FLRC 124 (1977); *State of New Mexico National Guard*, 5 FLRC 146, *request for reconsideration denied*, 5 FLRC 336 (1977). It had made clear its view that there was no "functional relationship between the day-to-day work performed by technicians and the requirement to wear military dress." *See, e.g., State of Ohio Air National Guard*, 6 FLRC 704 (1978). The Council had specifically rejected the Authority's rationale for finding nonnegotiability. *See, e.g., Kansas National Guard.* Instead, the question of attire was held to be a mandatory subject of bargaining except when there was a specific demonstration that wearing a uniform would be useful in the performance of the technician's duties such as during an "organizational readiness inspection." *State of Ohio Air National Guard.*

The Union claims that the Authority abandoned without explanation the requirement of close functional rela-

tionship. It also argues that the Authority failed to consider the alternative of standard civilian attire, thereby ignoring its own requirement that the subject agency show that its objective can only be accomplished by using the particular means at issue. *See, e.g., Planners, Estimators and Progressmen Association Local 8*, 13 FLRA No. 81 (1983) (the Authority found the elimination of time clocks to be a mandatory bargaining issue on the ground that the agency had not shown that its goals could be achieved only by that particular means).

When examining an agency's about-face, the general rule, as explained above, is that such changes constitute " 'danger signals' that the [Agency] may be acting inconsistently with its statutory mandate" and require a " 'reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.' " *Office of Communications of United Church of Christ*, 707 F.2d at 1425 (quoting *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 851, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). But this principle does not fully apply here because—unlike most other agencies—the FLRA has been expressly instructed by Congress to start afresh and avoid making the mistakes of its predecessor. *See AFGE* v. *FLRA*, 716 F.2d 47, 50 (D.C. Cir. 1983); *Brae Corp.*, 740 F.2d at 1038. Hence, we cannot say that it was arbitrary and capricious for the FLRA to find that there is a direct and integral relationship between wearing a military uniform and working within a military framework, even though its administrative predecessor held a different view.

The Union and amici also contend that the alternative of civilian attire would serve the Guard's goals while limiting the adverse effect on employees. If this is true, the Authority's failure to address that alternative in its opinion would be arbitrary, and require a remand. *See State Farm*, 103 S. Ct. at 2866; 5 U.S.C. § 7106(b)(3).

It was not arbitary for the Authority to consider it self-evident and unworthy of discussion that standard civilian attire would not "foster military discipline, promote uniformity, encourage *esprit de corps*, increase the readiness of the military forces for early deployment and enhance identification of the National Guard as a military organization."

## V

### THE AUTHORITY'S FACT-FINDING PROCEDURES

We turn finally to the Union and amici's three-prong challenge to the Authority's fact-finding procedures. First, they argue that by accepting only the statements of position at its proceedings the Authority acted contrary to this Court's remand order and in violation of 5 U.S.C. § 706(2)(D) and 5 U.S.C. § 7118(a)(b). Second, they contend that the Authority failed to make appropriate findings of fact in accordance with 5 U.S.C. § 557 and 5 U.S.C. § 7118(a)(8). Finally, it is their position that the Authority's findings of fact are not supported by substantial evidence, and hence should be reversed under 5 U.S.C. § 706. We consider each of these arguments.

### A. *Failure to Conduct Appropriate Proceedings*

Regarding development of the record, our previous decision required only that the Authority "develop a full record appropriate for judicial review." 696 F.2d at 205. We did not specify the particular procedure to be used on remand, leaving it instead to administrative discretion. The Union and amici point to the fact that the Authority denied the Guard's request for a hearing before an ALJ. The Union further asserts that it was thereby "prevented through no fault of its own from adducing additional evidence," and moves for this proceeding to be again remanded for the taking of additional, material evidence. *See* 5 U.S.C. § 7123(c). It claims that had

such a hearing been held it would have, for example, adduced evidence pertaining to what the job of an aircraft mechanic actually entails. Concededly, such evidence would be material, but the procedure used by the Authority in this case was similar to those it has used in resolving other negotiability disputes involving methods and means under Section 7106(b). *See, e.g., National Treasury Employees Union*, 2 FLRA No. 30. And although the Union did not waive whatever right it had to a hearing by failing to object to the procedures followed upon remand, the fact that it did not seek such a hearing and that the General Counsel, with whom it was allied, successfully objected to a hearing supports our conclusion that the procedures used were appropriate.

B. *Failure to Make Appropriate Findings of Fact*

Section 7118(a)(8) of the Labor Management Act and 5 U.S.C. § 557(c)(3) facilitate meaningful judicial review by requiring the FLRA to set forth its findings of fact with regard to all factual issues presented by the record. The Union argues that had this Court merely wanted additional legal arguments it could have solicited these itself instead of remanding the proceeding. This argument overlooks an important purpose of the remand. It was not intended simply to develop the record. Rather, it was to give the agency that Congress entrusted with the task of making law within the interstices of the statute an opportunity to exercise its developed expertise and be the first to address the question. Moreover, the objecting parties offer no authority for their argument that the statements and affidavits in some fashion fail to constitute evidence upon which factual findings may be based. The Authority drew a number of its findings from statements of position and attached affidavits submitted by the Guard. These findings relate to the nature and functions of the Guard and the uniform requirement as a "means" of accomplishing the Guard's mission.

C. *Findings Supported by Substantial Evidence*

We must defer to the FLRA findings of fact "if supported by substantial evidence on the record considered as a whole." 5 U.S.C. § 7123(c). In determining whether there is substantial evidence a court must set aside a decision if it "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, *including the body of evidence opposed to the Board's view.*" *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951) (emphasis added). The need to give particularized findings is especially critical when the decision constitutes an overruling of an established policy. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n.5 (1978). Again, substantial evidence cannot be found in conclusory rationales. *NLRB* v. *Yeshiva University*, 444 U.S. 672, 691 (1979).

The Union and amici emphasize that the Authority rejected the factual findings made by the Panel. After hearing testimony, that body had concluded:

> (1) the employer had failed to demonstrate a significant link between discipline at time of war and wearing the uniform while performing civilian technician duties,
>
> (2) Army National Guard technicians in New York have a long history of wearing various types of civilian attire without any showing of adverse effect on their work,
>
> (3) there is nothing in the record to demonstrate that the technicians' tasks have a significantly greater military purpose than reservists and civilian employees in the Department of Defense, who are not required to wear uniforms, and
>
> (4) there is no record evidence that even guardsmen at civilian jobs away from the base have any

particular difficulty in responding to emergency call-ups.

The Authority disregarded those findings without discussion and found that the uniform requirement fosters military discipline, promotes uniformity, encourages *esprit de corps* and increases the readiness of military forces for early deployment. If this case involved credibility determinations made by a trial examiner, the Authority's disagreement with the Panel's factual findings would be subject to considerable question. Yet, here the evaluation of the facts is a matter of weighing priorities, not assessing the demeanor of witnesses. Thus, the FLRA's findings cannot be said to be unsupported by substantial evidence. Its failure to consider and weigh the FSIP's contrary view was not fatal to its decision. In effect the Authority held that a functional relationship was not necessary for there to be a "direct and integral" relationship between wearing a uniform and the Guard's mission.

## CONCLUSION

Accordingly, for the reasons stated, the petition for review is denied.

# UNITED STATES COURT OF APPEALS
# FOR THE SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of April one thousand nine hundred and eighty-five.

Present:

HON. JAMES L. OAKES

HON. RICHARD J. CARDAMONE

HON. LAWRENCE W. PIERCE

Circuit Judges,

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No. 84-4128

NEW YORK COUNCIL, ASSOCIATION OF CIVILIAN TECHNICIANS,
*Petitioner*,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
*Respondent*.

STATE OF NEW YORK, DIVISION OF MILITARY AND NAVAL AFFAIRS, and UNITED STATES DEPARTMENT OF DEFENSE,
*Intervenors*.

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[Filed Apr. 19, 1985]

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A petition for a rehearing having been filed herein by Petitioner, New York Council, Association of Civilian Technicians,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

15 FLRA No. 65

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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Case No. 1-CA-19
8 FLRA 158

DIVISION OF MILITARY AND NAVAL AFFAIRS,
STATE OF NEW YORK, ALBANY, NEW YORK
*Respondent*

and

NEW YORK COUNCIL, ASSOCIATION OF
CIVILIAN TECHNICIANS,
*Charging Party*

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## DECISION AND ORDER UPON REMAND

This case is back before the Authority as a result of a remand by the U.S. Court of Appeals for the Second Circuit. *See State of New York, Division of Military and Naval Affairs v. FLRA*, 696 F.2d 202 (2nd Cir. 1982). In the Authority's original Decision,[1] the Respondent was found to have violated section 7116(a)(1) and (6) of the Federal Service Labor-Management Relations Statute (the Statute) by its refusal to cooperate in a final decision and order of the Federal Service Impasses Panel (the Panel)[2] which required the parties to adopt language in

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[1] *Division of Military and Naval Affairs, State of New York, Albany, New York*, 8 FLRA 158 (1982).

[2] *State of New York, Division of Military and Naval Affairs, Albany, New York and New York Council, Association of Civilian Technicians, Inc.*, 78 FSIP 32 (1979).

their collective bargaining agreement permitting National Guard technicians the option of wearing either a military uniform or agreed-upon civilian attire when performing civilian technician duties, with agreed-upon exceptions to cover circumstances for which the wearing of the uniform may be required. In finding a violation, the Authority relied upon *State of Nevada National Guard*, 7 FLRA 245 (1981), another unfair labor practice decision in which it rejected contentions that negotiations over technician attire in these circumstances were inconsistent with applicable law including the U.S. Constitution and the National Guard Technicians Act of 1968 (32 U.S.C. § 709, also referred to as the Technicians Act) or that negotiations were barred by an agency regulation for which a compelling need existed. In that case, no specific argument was raised based on the management rights provisions of Executive Order 11491, as amended, or of the Statute. The court, in reviewing the Authority's decision in *Division of Military and Naval Affairs, State of New York*, noted that the Authority's decision in *State of Nevada National Guard* did not deal with the question of whether the requirement that technicians wear military uniforms while performing technician duties constituted a methods and means of performing work within the meaning of section 7106(b)(1) of the Statute.[3] However, the court found that such question had properly been raised, but not addressed in the administrative proceedings before the Authority in *Division of Military and Naval Affairs, State of New York*. The court stated that the lack of a determination on that question was signifi-

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[3] Section 7106(b)(1) provides, in pertinent part, as follows:

§ 7106. *Management rights*

. . . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency . . . on the . . . methods, and means of performing work[.]

cant in view of the Authority's decision in *National Treasury Employees Union and U.S. Customs Service, Region VIII, San Francisco, California*, 2 FLRA 255 (1979) wherein the Authority held, *inter alia*, that a requirement that uniformed Customs Officers wear nameplates constituted a means of performing work. Thus, the court remanded the instant case to the Authority "to develop a full record appropriate for judicial review as to whether the attire the technicians should wear while engaged in their daily duties as civilians is a nonnegotiable matter under Section 7106(b)."

The Authority then issued a "Notice of Reopened Proceedings and Request for Statements of Position" in which it referred to the court's remand and direction that it "consider whether the attire which National Guard technicians wear while engaged in their daily duties as civilian technicians is a matter which is negotiable only at the election of the agency pursuant to section 7106(b)(1) of [the Statute]." The Authority requested "each of the parties to submit a statement of position with respect to this issue only, including any and all arguments in support thereof." In this regard, the National Guard Bureau, on behalf of the Respondent, filed a consolidated response which included affidavits from the Adjutants General of several states and the Charging Party filed its statement of position. The General Counsel of the Authority also filed a consolidated statement of position in this case. Upon careful consideration of the entire record on this issue, the Authority makes the following determinations.[4]

At the outset, the Authority must consider the General Counsel's motion to strike affidavits from the Adjutants General of several states which, as indicated above, were

[4] The National Guard Bureau's motion that a hearing before an Administrative Law Judge be conducted is denied since the additional submissions of the parties have established a full record upon which the Authority can decide the issue framed by the court.

submitted by the National Guard Bureau on behalf of the Respondent, as well as all references thereto and arguments which address matters other than the relationship between technician attire and section 7106(b)(1) of the Statute contained in the National Guard Bureau's statement of position. In view of the limited scope of the court's remand, as reflected in the Authority's ensuing request for statements of position, only those statements, arguments and reasons which relate to section 7106(b)(1) of the Statute have been considered herein, including those set forth in the affidavits submitted. Accordingly, the motion is granted to that extent.

The National Guard Bureau contends in essence that because the requirement to wear the military uniform is directly and integrally related to the ability of the technician workforce to carry out its role or functions and duties in pursuit of the overall military mission of the National Guard, it constitutes a "methods, and means of performing work." The General Counsel and the Charging Party, on the other hand, contend principally that wearing the military uniform has no direct and integral relationship to accomplishment of the technicians' duties while such employees are in their civilian status. They assert that in the absence of such a relationship, the military uniform does not constitute a method or means of performing work within the meaning of section 7106(b)(1) of the Statute.

For the reasons which follow, the Authority concludes, in agreement with the National Guard Bureau, that the requirement for civilian technicians to wear the military uniform at all times does constitute a "methods, and means of performing work" within the meaning of section 7106(b)(1) of the Statute.

In *U.S. Customs Service, Region VIII*, 2 FLRA 255 (1979), the Authority, as previously noted, determined that the requirement for uniformed Customs Officers to wear nameplates as part of their uniform for purposes

of identification constituted a means of performing work within the meaning of section 7106(b)(1) of the Statute. In reaching this decision the Authority, applying general rules of statutory construction, determined that a "means" is in essence anything used to attain or make more likely the attainment of a desired end, and in the context of section 7106(b)(1), refers to "any instrumentality, including an agent, tool, device, measure, plan, or policy used by the agency for the accomplishing or furthering of the performance of its work."

Turning to the instant case, it is uncontroverted in the record that the National Guard is a military organization with dual state and Federal military missions. Specifically, upon state mobilization it provides the State Governments with military units organized, equipped and trained to function in the protection of life and property, and the preservation of peace, order and public safety under the command of state authorities.[5] In this role it has been defined as "the modern militia reserved to the States by Art. I, Section 8, Cl. 15, 16 of the Constitution," *Maryland v. United States*, 381 U.S. 41, 46 (1965). Furthermore, as an integral part of the national defense when Federally mobilized, it provides the Federal Government with combat units, combat support units and qualified personnel for active military duty, to support augmentation requirements, to fulfill war and contingency commitments, and to perform such peacetime military missions as are compatible with training requirements and maintenance of mobilization readiness.[6] In addition, National Guard units must always be ready for Federal mobilization to assist in controlling domestic civil disorders. 10 U.S.C. § 331 *et seq.*

Within this military organization National Guard technicians function in three capacities in their respective

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[5] National Guard Brief at 5.

[6] *Id.* at 6.

units: They perform full-time civilian work; they perform military training and duty; and they are continuously available to enter active state or Federal military duty whenever mobilized. See H. Rep. No. 1823, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE & AD. NEWS 3318, 3319.

However, while these technicians were granted status as Federal civilian employees by the Technicians Act, it is clear that Congress intended to organize and administer the technician program within the military framework of the National Guard. This intent is reflected in, for example, specific provisions in the Technicians Act which condition the technicians' civilian employment status on maintenance of military membership in the National Guard. 32 U.S.C. § 709(b). As a consequence, technicians are automatically separated from their civilian technician employment if they cease to hold the military grade specified for their technician position or if they are separated from the National Guard for any reason. 32 U.S.C. § 709(e)(1); *State of Tennessee v. Dunlap*, 426 U.S. 312 (1976).

Moreover, in this respect, the U.S. Court of Appeals for the D.C. Circuit recently had occasion to examine the legislative history of the National Guard Technicians Act of 1968 in *American Federation of Government Employees, AFL-CIO, Local 2953 v. Federal Labor Relations Authority*, 730 F.2d 1534 (1984), *aff'g American Federation of Government Employees, AFL-CIO, Local 2953 and National Guard Bureau, Office of the Adjutant General, Nebraska*, 7 FLRA 87 (1981). In that case, the court upheld the Authority's decision that a proposal to preclude the use of military appraisals when establishing reduction in force retention registers for technicians was outside the duty to bargain. The court relied heavily on its conclusion that the technician workforce was established primarily to enable the National Guard to carry out its military mission and that technicians were

granted Federal civilian employment status in order to make them eligible for Federal retirement and fringe benefits and coverage under the Federal Tort Claims Act. Specifically, the court found that "the primary mandate of the [Technicians] Act is to insure that the military capability of the guard is effective and efficient" and further that there is "no obligation to trade on the essential mission of the National Guard at the bargaining table." 730 F.2d at 1546.

Other courts similarly have relied upon this interrelationship between the duties performed by technicians and the ability of the National Guard to maintain its combat readiness. In *Bruton v. Schnipke*, 404 F.Supp. 1932 (E.D. Mich. 1975) for example, the court concluded that the requirement that civilian technicians wear military uniforms was rationally related to the National Guard's purpose, based on its view that technician employment is essentially military in nature. In this regard, in the court's opinion denying an earlier motion for a preliminary injunction, (*Bruton v. Schnipke*, 370 F.Supp. 1157, 1163 (E.D. Mich. 1974)), the court stated:

> The National Guard is a military organization. Its functions are primarily military. The reason for its existence is primarily military. All of the testimony supports the conclusion that technicians function in a more military fashion if they wear the military uniform. Indeed, it is because wearing the uniform requires [technicians] to perform their work in a military way that they object. It does not seem unreasonable to have military work performed in a military manner. Given the National Guard's purpose and function the Court cannot say that the regulation is not reasonably related to the National Guard's purpose.

Likewise, in *Syrek v. Pennsylvania Air National Guard*, 437 F.Supp. 236 (W.D. Pa. 1977) the court determined that application of military grooming stand-

ards to civilian technicians was reasonably related to the National Guard's interest in assuring its combat readiness. The court found that Congress, by its decision to organize and administer the technician program within the military framework of the National Guard, as well as to create an extremely close connection between the technicians' civilian and military status, had placed great emphasis on uniformity, discipline and *esprit de corps* in the technician program. In reaching its conclusion the court stated: [7]

> [T]echnicians perform their duties on military equipment using military procedure in a military environment. The requirement that civilian technicians, as a part of the overall disciplinary requirements of their jobs, comply with Air Force hair standards is reasonably related to assuring the combat readiness of the Guard, which is the technicians' primary purpose.

Moreover, the court in *Klotzbach v. Gallaway*, 473 F.Supp. 1337 (W.D. N.Y. 1979), finding *Bruton* and *Syrek* to be controlling, also determined that because of the clear interrelationship between technicians' duties and the effective function of the Guard it was rational for the Guard to establish standards of appearance, including dress requirements, for technicians. In so concluding the court stated: [8]

> Congress has chosen to administer the technician program within the military framework of the Guard and to give technicians dual status as civilians and military personnel. The legislative history of the Act indicates that Congress contemplated a single technician position, which "would entail a composite of inseparable, simultaneous military and

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[7] *Syrek v. Pennsylvania Air National Guard, supra,* at 240.

[8] *Klotzbach v. Callaway, supra,* at 1343.

> civilian duties." [Citations omitted.] This intent is reflected in the statutory requirement of enrollment in the Guard as a condition of employment as a technician. Although the plaintiff would like a clear division between civilian duties and military duties, this simply is not possible because of the dual qualification aspect of the position.

In the instant case, the record shows that the National Guard Bureau uses the requirement for civilian technicians to wear military uniforms to foster military discipline, promote uniformity, encourage *esprit de corps*, increase the readiness of the military forces for early deployment and enhance identification of the National Guard as a military organization. In this regard for example, it is undisputed in the record that the ability of the part-time Guard to mobilize into an effective full-time military force is directly dependent upon the full-time technician workforce. Moreover, the record before the Authority indicates that because technicians are already in uniform, National Guard unit commanders have the technician workforce itself available for instant deployment in response to any disaster or civil assistance request while mobilization of the part-time Guardspersons is in process.[9]

However, due to the unique status of technicians as compared to other Federal employees, and as a result of the essential role they play in achieving rapid mobilization of the part-time Guard into a military force, technicians must possess a highly developed sense of *esprit de corps* and military discipline which enables them to be instantaneously convertible to active military status. But, because the traditional means of instilling *esprit de corps* and military discipline, such as drill, military courtesy and protocol, are not available for use with personnel who are employed technically in a civilian status, the

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[9] National Guard Brief, Exhibit B at 7.

wearing of the military uniform becomes indispensable as a constant reminder to technicians that they are members of an organization which is essentially military and subject to mobilization at a moment's notice.

In addition to the vital role technicians play in effectuating rapid mobilization and deployment of the Guard, they are also statutorily responsible for training the part-time National Guard. 32 U.S.C. § 709(a)(1). Specifically, the record indicates that the purpose of this training is to enable the National Guard to achieve a high degree of military readiness and that such training frequently occurs during the technician's workweek.[10] As a consequence, the uniform wearing requirement is utilized by the National Guard to create the most realistic military environment possible in order for such military training to be successful.

Therefore, based on the foregoing, and consistent with the judicial determinations supporting the conclusion that there is a direct and integral relationship between the uniform wearing requirement and the duties technicians perform in furtherance of the overall military mission of the National Guard, discussed above, we find the determination by the National Guard Bureau that technicians must wear the military uniform while performing technician duties constitutes management's choice of a "methods, and means of performing work" within the meaning of section 7106(b)(1) of the Statute. Thus, while this requirement may be bargained at the election of the agency, it is not within the duty to bargain.

Consequently, in the circumstances of this case, the failure of the Respondent to cooperate in the final decision and order of the Federal Service Impasses Panel did not constitute a violation of section 7116(a)(1) and (6) of the Statute.

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[10] National Guard Brief, Exhibit A at 7-8.

## ORDER [11]

IT IS ORDERED that the complaint in Case No. 1-CA-19 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., July 17, 1984

/s/ Barbara J. Mahone
BARBARA J. MAHONE, Chairman

/s/ Ronald W. Haughton
RONALD W. HAUGHTON, Member

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[13] This Order shall supersede our earlier Order in this matter.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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Case No. 1-CA-19
8 FLRA 158

DIVISION OF MILITARY AND NAVAL AFFAIRS,
STATE OF NEW YORK, ALBANY, NEW YORK,
*Respondent*

and

NEW YORK COUNCIL, ASSOCIATION OF
CIVILIAN TECHNICIANS,
*Charging Party*

CERTIFICATE OF SERVICE

Copies of the Decision and Order Upon Remand of the Federal Labor Relations Authority in the subject proceeding have been mailed upon issuance to the parties listed below:

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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Nos. 138, 139, Dockets 82-4072, 82-4090

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STATE OF NEW YORK, DIVISION OF MILITARY AND NAVAL AFFAIRS (ALBANY, NEW YORK), and The Department of Defense,

*Petitioners-Cross-Respondents,*

v.

FEDERAL LABOR RELATIONS AUTHORITY (Boston, Massachusetts),

*Respondent-Cross-Petitioner.*

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Argued Oct. 21, 1982

Decided Dec. 10, 1982

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Marc Richman, Atty., Appellate Staff, Civ. Div., Dept. of Justice, Washington, D.C. (J. Paul McGrath, Asst. Atty. Gen., William Kanter, Atty., Appellate Staff, Civ. Div., Dept. of Justice, Joseph R. Reyna, Atty., National Guard Bureau, Washington, D.C., of counsel), for petitioner-cross-respondent.

William E. Persina, Atty., Federal Labor Relations Authority, Washington, D.C. (Steven H. Svartz, Acting Sol., Federal Labor Relations Authority, Washington, D.C., of counsel), for respondent-cross-petitioner.

Drennan A. Clark, Col., Nevada Air National Guard, State Judge Advocate, Nevada Military Dept., Carson City, Nev., for amicus curiae Adjutants General Ass'n of the United States.

Meranze, Katz, Spear & Wilderman, Philadelphia, Pa. (Bernard N. Katz, Leonard Spear and Bruce E. Endy, Philadelphia, Pa., of counsel), for amicus curiae New York State Council, Ass'n of Civilian Technicians, Inc.

Before OAKES and WINTER, Circuit Judges, and METZNER,* District Judge.

METZNER, District Judge:

The petitioner, State of New York, Division of Military and Naval Affairs (National Guard), seeks review of an order of the Federal Labor Relations Authority (FLRA). The order stated that the National Guard had engaged in an unfair labor practice and required the National Guard to include in its collective bargaining agreement with the New York Council, Association of Civilian Technicians, Inc. (technicians), a provision to the effect that the technicians may, at their option, wear a military uniform or agreed-upon civilian attire while performing their work. This provision was to be subject to agreed-upon exceptions where the wearing of the uniform might be required.

The FLRA cross moves for the enforcement of its order.

Pursuant to the National Guard Technician Act of 1968, 32 U.S.C. § 709 (1980), the Guard employs full-time civilian technicians to administer and train the National Guard and to maintain and repair the supplies issued to the National Guard. As a condition of their employment the technicians must become and remain

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* The Honorable Charles M. Metzner of the United States District Court for the Southern District of New York, sitting by designation.

members of the National Guard. As members of the National Guard they are required to discharge the members' responsibilities which include participation in training assemblies and encampments, and they are subject to being called into active service. Their positions are exempted from competitive civil service, but they are considered federal civilian employees for the purpose of the federal service labor-management relations program established by Executive Order No. 11491, 3 C.F.R. 861 (1966-1970 Compilation), and later by Title VII of the Civil Service Reform Act of 1978,[1] 5 U.S.C. § 7101-35 (1978).

The instant problem arose during the course of collective bargaining negotiations between the National Guard and the technicians. Negotiations broke down over the technicians' proposal that they be given the option of wearing standard civilian attire while acting as technicians in civilian employment. The National Guard insisted that the technicians wear standard military uniforms when performing their day-to-day duties. The technicians then requested that the matter be considered by the Impasses Panel pursuant to Section 17 of the Executive Order.

On January 9, 1979, the Panel directed the parties to resolve the impasse by adopting language in their agreement affording the technician employees "the option of wearing either the military uniform or an agreed-upon standard civilian attire without display of military rank," subject to exceptions to be negotiated to cover circumstances where the wearing of the uniform might be required. The National Guard sought FLRA review of this determination claiming that the matter of attire involved a non-negotiable issue. The request was denied

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[1] Executive Order No. 11491 was the predecessor of Title VII and was in effect at the time of negotiations in this case. The provisions of each are similar insofar as the problem in this proceeding is concerned.

on the ground that there was no authorization for direct appeal from the Panel decision either under the Executive Order or Title VII.[2] The FLRA advised that the National Guard could obtain review only in an unfair labor practice proceeding. Refusal to follow the Panel's directive constitutes an unfair labor practice. 5 U.S.C. § 7116(a)(6). The FLRA would, in the course of such proceeding, review the Panel decision.[3]

Since the National Guard had refused to follow the directive, the technicians had already filed an unfair labor practice charge. The matter came on for resolution before an Administrative Law Judge. In his decision the judge stated that he was aware of the FLRA position that a Panel decision was only reviewable through the unfair labor practice procedures. He also understood that it was the purpose of the National Guard in the proceedings before him "to challenge and obtain a full review of the Panel's underlying premise that the wearing of the uniform is a negotiable matter." Nevertheless, he found full review of the Panel's decision unwarranted.

The National Guard had raised in its answer to the unfair labor practice charge two reasons, among others, that the Panel's decision was invalid. First, it forced the National Guard to meet a standard of compelling need to support a regulation it deemed non-negotiable. Second, the decision violated Section 12(b)(5) of Executive Order No. 11491, as amended, 3 C.F.R. 159 *reprinted in* 5 U.S.C. § 7101 note (Supp. IV 1980). Section 12(b)

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[2] Title VII had become effective January 11, 1979.

[3] In *State of Nevada National Guard*, 7 FLRA No. 37 (1981), the FLRA commented on the National Guard's attempt to obtain direct review of the Panel's decision in that case by the Court of Appeals of the Ninth Circuit. The Court had dismissed the petition. The FLRA pointed out that the court was fully apprised of the fact that review of the Panel's decision depends on the filing of an unfair labor practice charge and the issuance of a final order by the FLRA in that case.

(5) and 5 U.S.C. § 7106(b) are substantially the same, and define management rights which are non-negotiable at the option of the agency.

After hearing argument and reading the papers submitted, the judge entered his decision and order in which he engaged in a long discussion of the scope of review. He sustained the charge, stating that the National Guard "has failed to establish a valid reason for its refusal to comply with the Panel's decision regardless of how the finality of the Panel's decision is approached." He continued:

> "Therefore, as I find no special circumstance which would require review of the Panel's Decision and Order, I conclude that further review of the Panel's Decision is unwarranted. In my judgment, to inquire further into the soundness of the Panel's factual findings and legal conclusions or the procedures it employed in reaching its decision would inevitably result in opening inquiry into essentially a full review of the Panel's actions."

The decision concluded with the statement that "a party who refuses to follow the Panel's final decision does so at its peril."

A full review of the Panel's action was sought, it was what the statute contemplated according to the FLRA, but it was denied to the National Guard by the Administrative Law Judge who did not address the issue of negotiability.

The decision and order was reviewed by the FLRA on exceptions filed by the National Guard. The FLRA stated that it had "reviewed the rulings of the judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed." Based on the FLRA's decision in *State of Nevada National Guard*, 7 FLRA No. 37 (1981), the FLRA agred that the National Guard had committed an unfair labor practice.

The FLRA found it unnecessary to engage in a discussion of the appropriate scope of review of a Panel decision. This order and decision of the FLRA is the subject of this petition for review and the cross application for enforcement of the order.

The FLRA's decision in *State of Nevada National Guard, supra,* deals with the "compelling need" standard by which a matter covered by an agency regulation may be deemed non-negotiable, 5 U.S.C. § 7117(a)(2), but makes no mention of management rights reserved in Section 7106. It is this latter section which was properly raised in the administrative proceedings and which has not been dealt with either by the Administrative Law Jugde or the FLRA.

The failure to deal with the issue of management rights here is significant in view of the FLRA decision in *National Treasury Employees Union v. United States Customs Service, Region VIII, San Francisco, California, Region VIII, San Francisco, California,* 2 FLRA No. 30 (1979). In that case the FLRA upheld, as a management right not subject to negotiation pursuant to Section 7106(b), an agency's directive requiring all uniformed personnel to wear name plates as part of the official uniform.

The proceeding is remanded to the FLRA to develop a full record appropriate for judicial review as to whether the attire the technicians should wear while engaged in their daily duties as civilians is a non-negotiable matter under Section 7106(b).

8 FLRA No. 33

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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Case No. 1-CA-19

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DIVISION OF MILITARY AND NAVAL AFFAIRS,
STATE OF NEW YORK, ALBANY, NEW YORK,
*Respondent*

and

NEW YORK COUNCIL, ASSOCIATION OF
CIVILIAN TECHNICIANS,
*Charging Party*

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## DECISION AND ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision and Order.

Pursuant to section 2423.29 of the Authority's Rules and Regulations (5 CFR 2423.29) and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby af-

firmed.[1] Upon consideration of the Judge's Decision and Order and the entire record in this case, including the Respondent's exceptions, the Authority hereby adopts the Judge's recommendations as modified herein.[2] Based on the Authority's decision in *State of Nevada National Guard*, 7 FLRA No. 37 (1981), and the rationale therein, the Authority agrees with the Judge that the Respondent violated section 7116(a)(1) and (6) of the Statute. The Authority finds in unnecessary, in view of the nature of the exceptions, to address further the Judge's discussion of the scope of the Authority's review of Federal Service Impasses Panel decisions.

## ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Division of Military and Naval Affairs, State of New York, Albany, New York, shall:

1. Cease and desist from:

(a) Refusing to honor and abide by the January 9, 1979, Decision and Order of the Federal Service Impasses Panel regarding "Wearing of the Military Uniform" or in any other manner failing or refusing to cooperate in impasse decisions or procedures.

(b) Refusing to adopt the following language in their collective bargaining agreement with the New York Council, Association of Civilian Technicians:

> Employees, while performing their day-to-day technician duties, shall have the option of wearing either

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[1] In this connection, Respondent has advanced no basis sufficient to warrant consideration by the Authority of factual arguments not previously raised before the Federal Service Impasses Panel.

[2] The affirmative action portion of the Judge's Recommended Order is modified herein based on the circumstances of this case.

(a) the military uniform or (b) an agreed-upon standard civilian attire without displaying military rank, such clothing to be purchased by employees who choose to wear it.

(c) Refusing to agree upon and incorporate in their collective bargaining agreement with New York Council, Association of Civilian Technicians those circumstances and occasions for which the wearing of the military uniform may be required.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Adopt the following language in its collective bargaining agreement with the New York Council, Association of Civilian Technicians:

> Employees, while performing their day-to-day technicians duties, shall have the option of wearing either (a) the military uniform or (b) an agreed-upon standard civilian attire without display of military rank, such clothing to be purchased by employees who choose to wear it.

(b) Meet and negotiate with the New York Council, Association of Civilian Technicians regarding those circumstances and occasions for which the wearing of the military uniform may be required and incorporate the agreement reached in its collective bargaining agreement.

(c) Post at its facilities wherever unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Adjutant General of the Division of Military and Naval

Affairs, State of New York and shall be posted by him for 60 consecutive days in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Adjutant General shall take reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have beer taken to comply herewith.

Issued, Washington, D.C., February 19, 1982

/s/ Ronald W. Haughton
RONALD W. HAUGHTON, Chairman

/s/ Henry B. Frazier III
HENRY B FRAZIER, III, Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES
OF CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGMENT
RELATIONS
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to honor and abide by the January 9, 1979, Decision and Order of the Federal Service Impasses Panel regarding "Wearing of the Military Uniform" or in any other manner failing or refusing to cooperate in impasse decisions or procedures.

WE WILL NOT refuse to adopt the following language in our collective bargaining agreement with the New York Council, Association of Civilian Technicians:

> Employees, while performing their day-to-day technicians duties, shall have the option of wearing either (a) the military uniform or (b) an agreed-upon standard civilian attire without displaying military rank, such clothing to be purchased by employees who choose to wear it.

WE WILL NOT refuse to agree upon and incorporate in our collective bargaining agreement with New York Council, Association of Civilian Technicians those circumstances and occasions for which the wearing of the military uniform may be required.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of

their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL adopt the following language in our collective bargaining agreement with the New York Council, Association of Civilian Technicians:

> Employees, while performing their day-to-day technician duties, shall have the option of wearing either (a) the military uniform or (b) an agreed-upon standard civilian attire without display of military rank, such clothing to be purchased by employees who choose to wear it.

WE WILL meet and negotiate with the New York Council, Association of Civilian Technicians regarding the circumstances and occasions for which the wearing of the military uniform may be required and incorporate the agreement reached in our collective bargaining agreement with such labor organization.

_____

(Agency or Activity)

Dated: _____

By: _____

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, 441 Stuart Street, 9th Floor, Boston, Massachusetts 02116, and whose telephone numbmer is (617) 223-0920.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

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Case No. 1-CA-19

DIVISION OF MILITARY AND NAVAL AFFAIRS,
STATE OF NEW YORK, ALBANY, NEW YORK,
*Respondent*

and

NEW YORK COUNCIL, ASSOCIATION OF
CIVILIAN TECHNICIANS,
*Charging Party*

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## CERTIFICATE OF SERVICE

Copies of the Decision and Order of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the parties listed:

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Mr. Frederick S. Tedesco
New York State Chairman ACT, Inc.
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Staten Island, New York 10312

Mr. Vincent J. Paterno, President
Association of Civilian Technicians
348A Hugerford Court
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Colonel Clarence C. Wallace
Personnel Officer
Division of Military & Naval Affairs
Public Security Bldg., State Campus
Albany, New York 12226

Mr. John Giarrusso
38 Harris Avenue
Johnston, Rhode Island 02919

Mr. Edward S. Davidson
Regional Director
441 Stuart Street
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Boston, MA 02116

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, N.W.
Washington, D.C. 20036

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Case No. 1-CA-19

DIVISION OF MILITARY AND NAVAL AFFAIRS,
STATE OF NEW YORK, ALBANY, NEW YORK,
*Respondent*

and

NEW YORK COUNCIL, ASSOCIATION OF
CIVILIAN TECHNICIANS,
*Charging Party*

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C. Roger Lunden, Esquire
For the Respondent

Richard O. Zaiger, Esquire
For the General Counsel

John Giarrusso
For the Charging Party

Before: SALVATORE J. ARRIGO
Administrative Law Judge

## DECISION

### Statement of the Case

This is a proceeding under the Federal Service Labor-Management Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101 *et seq.*

Upon a charge filed by New York Council, Association of Civilian Technicians (the Union) on March 15, 1979,

and amended on October 17, 1979, against Division of Military and Naval Affairs, State of New York, Albany, New York,[1] the General Counsel of the Authority, by the Regional Director for Region 1, issued a Complaint and Notice of Hearing on October 17, 1979, alleging that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Sections 7116(a)(1) and (6) of the Statute. The complaint alleged that since February 9, 1979, Respondent refused and continues to refuse to comply with a Decision and Order of the Federal Service Impasses Panel dated January 9, 1979, requiring the Charging Party and Respondent to adopt into their collective bargaining agreement certain language relative to wearing of the military uniform. On October 26, 1979, Respondent filed its answer to the complaint wherein it admitted in part and denied in part the allegations in the complaint and set forth various affirmative defenses.

On January 15, 1980, counsel for the General Counsel filed a Motion for Summary Judgment and on January 30, 1980, Respondent filed a Statement in Opposition to Charging Party's (sic) Motion for Summary Judgment and Cross-Motion for Summary Judgment.[2] On January 31, 1980, the parties were notified that ruling on the outstanding motions would be held in abeyance pending receipt of argument at the hearing scheduled for February 5, 1980.

At the hearing conducted on February 5, 1980 in Albany, New York all parties were represented and afforded full opportunity to present argument on their respective positions. Based upon the entire record in this matter, including the documents received in evidence and

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[1] Respondent's name appears as amended at the hearing.

[2] The cross-motion requested summary judgment relative to the allegation that Respondent violated Section 7116(a)(1) of the Statute.

the arguments made at the hearing, counsel for the General Counsel's Motion for Summary Judgment was granted and Respondent's Cross-Motion for Summary Judgment was denied at the hearing. My ruling is based upon the following:

Findings and Conclusions

1. On March 27, 1978, the Union filed a request with the Federal Service Impasses Panel to consider a negotiation impasse with the Respondent under Section 17 of Executive Order 11491, as amended.

2. The parties appeared before a representative of the Panel at a factfinding hearing conducted on June 7 and 8, 1978, at which time the parties presented testimony and documentary evidence and argument relative to the impasse at issue which included the question of whether technicians should be required to wear the military uniform or permitted to wear civilian clothing when performing technician duties, the only issue concerned herein.

3. On September 28, 1978, a Panel Report and Recommendation for Settlement (78 FSIP 32) issued which provided, *inter alia*:

> "a. The parties should adopt language in their agreement affording employees, while performing their day-to-day technician duties, the option of wearing either (a) the military uniform or (b) an agreed-upon standard civilian attire without display of military rank, such clothing to be purchased by employees who choose to wear it.
>
> "b. The parties should agree upon exceptions to cover those circumstances and occasions for which the wearing of the military uniform may be required."

4. Respondent considered the Panel's Report and Recommendation and on October 31, 1978, took exception to

the Panel's recommendation and requested review of the Panel's decision.

5. On January 1, 1979, the Panel issued its Decision and Order in the matte and ordered:

> "a. The parties shall adopt the following language in their agreement:
>
> > Employees, while performing their day-to-day technician duties, shall have the option of wearing either the military uniform or an agreed-upon standard civilian attire without display of military rank, such clothing to be purchased by employees who choose to wear it.
>
> b. Circumstances and occasions for which the wearing of the military uniform may be required shall be agreed upon by the parties and incorporated in their agreement."

6. By letter dated February 9, 1979, to the Panel, a copy of which was also sent to the Union, Respondent stated it had "initiated proceedings to obtain judicial review of the Panel's Order in accordance with Section 7123 (of the Statute . . . and) that portion of the order must be placed in abeyance pending the outcome of our judicial initiative".

7. The Panel responded on February 28, 1979, and, having considered Respondent's letter of February 9, to be a motion to hold in abeyance, denied the motion finding no persuasive reasons were presented to support the motion.

8. On March 7, 1979, Respondent filed with the Authority a document entitled "Petition for Reconsideration" wherein it requested that the Authority review the propriety of the Panel Order dated 9 January 1979, insofar as it mandated the adoption of the language related to the wearing of the uniform. The issues set forth by Respondent were as follows:

"Did the Federal Labor Relations Council, an agency within the meaning of the Administrative Procedure Act, by its authority derived from an executive order, have the power to vitiate a military regulation applicable only to National Guard technicians, and promulgated pursuant to statute by the Department of Defense?

"Assuming that the Federal Labor Relations Council had the authority to review federal civilian employee regulations for the purpose of determining their negotiability, and that said review was properly made according to a 'compelling need' standard, did an invalid determination of negotiability result as to a particular military regulation by reason of an invalid application of the standard for review?"

9. On October 17, 1979, counsel for the General Counsel issued a Complaint alleging Respondent's refusal to abide by the Panel's Decision and Order of January 9, 1979, violated Sections 7116(a)(1) and (6) of the Statute, which provisions declare it to be an unfair labor practice:

"(1) to interfer with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions . . ."

10. On October 26, 1979, Respondent filed its Answer to the Complaint essentially admitting the fact of its refusal to take the action ordered by the Panel in its January 9, 1979, Decision and Order, but denying that such conduct violated the Statute. Further, Respondent set forth various affirmative defenses by challenging the jurisdiction of the Authority to act on the Complaint while Respondent's Petition for Reconsideration of March 7, 1979, had not been ruled on and alleging a violation of

due process of law with regard thereto; alleging that laches and/or equitable considerations compels the conclusion that the Union's charge was abandoned; contending the Panel's January 9, 1979, was invalid and contrary to law in various respects; and contending that an improper Respondent had been named.

11. On December 5, 1979, the Authority denied Respondent's March 7, 1979 "Petition for Reconsideration" which the Authority construed to be "petition for direct review". The Authority concluded that the Statute does not sanction Authority review of a Panel Decision and Order "except through the unfair labor practice procedures set forth in the Statute."

12. By mailgram dated December 20, 1979, the Union requested Respondent negotiate to implement the Panel's Decision and Order of January 9, 1979. Respondent, on December 21, 1979, declined to negotiate by stating: "As you are well aware it is our intention to pursue judicial review should this Division be unsuccessful in defending the uniform requirement before the Authority in February." [3]

13. Counsel for the General Counsel filed a Motion for Summary Judgment on January 15, 1980, noting that on December 5, 1979, the Authority denied Respondent's Petition for Reconsideration. Counsel for General Counsel contended that Respondent, in its Answer of October 26, 1979, ". . . does not or cannot deny the pertinent factual allegations of the Complaint" and that since ". . . all material facts (have) been admitted or established beyond controversy a Motion for Judgment is appropriate unless the facts referred to . . . are insufficient to constitute a violation of Section 7116(a)(1) and (6) of the Statute or merit is found in one of Responden't five (5) affirmative defenses which it raised in its Answer."

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[3] A hearing on the complaint had been scheduled for February 5, 1980.

14. On January 30, 1980, Respondent filed a "Statement in Opposition to Charging Party's (sic) Motion for Summary Judgment and Cross-Motion for Summary Judgment" in which it did not challenge or put in dispute Counsel for the General Counsel's representation that Respondent failed to comply with the Decision and Order of the Panel or the facts as set forth above. In this regard Respondent presented various documents which were part of the record placed before the Panel when the uniform issue was being presented to the Panel for determination. The basis of Respondent's argument in opposition to the Motion for Summary Judgment is its desire to challenge and obtain a full review of the Panel's underlying premise that the wearing of the uniform is a negotiable matter.[4] Respondent accordingly seeks an opportunity in this proceeding to challenge the prior determination of the Council, as augmented by "new evidence" on this issue, and have the entire matter reviewed by the Authority through the administrative process. Thus, Respondent argues that an administrative unfair labor practice hearing should be conducted in order to provide a full administrative review of ". . . not only the underlying record before the Panel but . . . any new evidence which is germane to (Respondent's) failure to comply with the Decision and Order . . ."

In addition, Respondent in the cross-motion for summary judgment contends that a refusal to comply with a Panel decision does not constitute a violation of Section

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[4] The Panel, in its January 9, 1979, Decision and Order considered the following Council decisions to be controlling: *National Association of Government Employees, Local R14-87 and Kansas National Guard*, FLRC No. 76A-16 (and other cases consolidated therewith) (January 19, 1977), Report No. 120; and *National Federation of Federal Employees, Local 1636, and State of New Mexico National Guard*, FLRC No. 76A-75 (and other cases consolidated therewith) (January 19, 1977), Report No. 120; requests for reconsideration denied (May 18, 1977), Report No. 125.

1716(a)(1) of the Statute absent evidence to support a finding of *male fides* or intent to interfere, restrain, or coerce employees.

15. At the hearing conducted before me on February 5, 1980,[5] Respondent conceded it did not comply with the Panel's Decision and Order of January 9, 1979. However, Respondent contended that the Panel made an improper decision based on the evidence before it; that the Panel gave insufficient weight to Respondent's evidence; that additional new evidence germain to the issue before the Panel should now be received; that the Administrative Law Judge and the Authority should review the evidence that was before the Panel, and additional new evidence, and reconsider and reverse the decision of the Panel. Respondent also acknowledged that no new legal arguments were being raised at the hearing which were not previously raised before the Panel and the only factual matters Respondent wished to present at the hearing, which was not previously presented to the Panel, was new evidence with regard to the "consequences" to the National Guard from the use of civilian attire by technicians.

With regard to the "consequences" evidence, after permitting an offer of proof I rejected receipt of such testimony. The offer of proof reveals that, if permitted, Respondent would adduce testimony relating to National Guard units where contractual uniform provisions similar to that ordered by the Panel herein were in effect, as follows:

(a) In August 1978, in Massachusetts, a person in uniform did not want to take orders from an individual in civilian clothing since the uniformed person had no way of knowing the rank of the individual in civilian

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[5] Respondent's unopposed motion to correct the transcript is hereby granted.

attire thus, opinion evidence would show, producing a "command problem".

(b) Respondent was informed in January 1979 that on some undisclosed date an Ohio technician in civilian attire was refused training in Panama because of appearance thereby, in the opinion of Respondent's witness, depriving the unit of the benefit of training the individual would have acquired.

(c) In December 1978 or January 1979, in Pennsylvania, a technician allowed his beard to grow between monthly drills thereby providing an unkempt appearance which, hearsay and opinion testimony would show, would produce a source of irritation to members of the public and the office he represents.

(d) The commanding officer of the Montana National Guard would testify that between July 1978 and February 1979 in Montana; [6]

(i) An undisclosed number of "part-time" guardsmen who were not technicians objected to technicians who did not wear the uniform and found the technicians failure to follow the more stringent prior uniform and grooming regulations to be a "considerable irritant".

(ii) Violations of the uniform clause have been "frequent and varied" such as wearing a mix of military and civilian attire, wearing improper footwear and wearing military cold weather gear with civilian clothing. Mix of clothing violations are a "constant irritation" and when violators complain to their union representatives, the "irritation" and loss of time occasioned results in reduced work effectiveness of the individuals involved and the entire unit.

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[6] Dates established from an affidavit of the Montana Air National Guard commanding officer dated February 6, 1979 indicating that in May 1978, the uniform option was added to that units collective bargaining agreement by Panel Order.

(iii) "Some" individuals in civilian attire use the clothing controversy as a shield for bad behavior, for instance, responding to comments of unsatisfactory work performance or failure to receive special schooling or assignments by claiming that the adverse treatment was a result of choosing to wear civilian clothing. "A number" of unfair labor practices have been filed charging management with such discrimination and valuable time is spent investigating and attempting to resolve these charges.

(iv) Mission accomplishment and overall attitude and morale of the unit has been adversely affected as a result of the "constant argument" over proper work attire and the loss of time" arguing over petty clothing standards."

16. At the hearing conducted on February 5, 1980, I granted counsel for General Counsel's Motion for Summary Judgment and denied Respondent's Cross-Motion for Summary Judgment. I noted that the only matter not before the Panel when it issued its decision was the proffered evidence contained in the offer of proof. I concluded that Respondent's reasons for refusing to comply with the Panel's Decision and Order were invalid, that no further hearing was warranted and accordingly, Respondent by its conduct violated Section 7106(a)(6) of the Statute.

I further concluded that by its refusal to comply with the Panel's Decision and Order, Respondent also violated Section 7116(a)(1) of the Statute even though no specific additional evidence was presented relative to establishing Respondent's bad faith.

## Discussion

Respondent argues that under the Statute an Administrative Law Judge is empowered to reverse a decision of the Panel both by reaching different factual and/or legal

conclusions than the Panel reached in its deliberations as well as considering matters which were not before the Panel when it decided the issue.

The extent to which a decision of the Panel should be accorded finality is a matter of first impression at this time. However, in my view Respondent has failed to establish a valid reason for its refusal to comply with the Panel's decision regardless of how the finality of the Panel's decision is approached.

Obviously, if the Panel's decision is considered to be absolutely final and binding as far as the administrative process is concerned, Respondent's failure to comply with that decision is the only subject of administrative review and a violation of the Statute is clear. Thus, only the Panel would have authority to question its own findings and conclusions and the Panel would be the only body which would be empowered to consider any "new facts" which arose subsequent to the Panel's initial decision.[7] The legislative history of the Statute gives some support for this theory. Section 7119(c) of the Statute provides that "final action" of the Panel shall be "binding" on the parties. The legislative history or the Statute reveals that the Senate bill under consideration in 1978 (S. 2640) contained a provision expressly providing that the Authority "may consider" exceptions to final decisions and orders of the Federal Service Impasses Panel.[8] The Senate Committee Report on this section of the bill states:[9]

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[7] While Respondent by its "Petition for Reconsideration" of March 7, 1979, requested the Authority to "review" the Panel's decision, Respondent did not at any time present its arguments for reconsideration to the Panel.

[8] *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform of 1978*, 96th Congress, 1st Session, Committee Print No. 96-7, (November 19, 1979) at 455, 510, 567.

[9] *Id.*, at 761.

> "The provision further expressly sanctions appeals to the Authority from final decisions and order of the Federal Service Impasses Panel. The broad authority of the Council under Executive Order 11491 to interpret the Order, decide major policy issues and take whatever action is required to effectuate the purposes of the Order implies a right to oversee final decisions and orders of the Panel. This subchapter specifically sets forth the limited power of review by the central authority to assure uniform application of the legal requirements in the program, but it is not anticipated that it would often be necessary to exercise it except in the unlikely event that the legal requirements of the program are misapplied. The Authority would not otherwise review the substance or merits of any final decisions and orders of the Panel."

On the House side, the corresponding bill under consideration in 1978 (H.R. 11280) made no express provision for Authority review of final decisions of the Panel. Indeed, the House Report of July 31, 1978 contains the following explanatory language: ". . . the action (of the Panel) is final and binding on the parties. . . Final action of the Panel under this section is *not subject to appeal* and failure to comply with any final action order by the Panel constitutes an unfair labor practice. . . ." [10] (Emphasis added). Accordingly, since the language in S. 2640 was not adopted and the House version was the one subsequently enacted, it may well be argued that Congress intended to completely exempt final Panel decisions from any type of administrative review. However, it would appear that this interpretation may have already been rejected by the Authority in that its December 5, 1979 response to Respondent's March 7, 1979 "Petition for Reconsideration" stated, *inter alia*; ". . . Authority review of a final Panel Decision and Order . . .

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[10] *Id.*, at 700.

may be sought . . . only after the filing of unfair labor practice charges . . ." This sttaement could be interpreted as suggesting that the Authority construes its function to review, in some dimension, final decisions of the Panel.

A second approach to the question of appealability of a final decision of the Panel might be to consider a Panel decision to be reviewable only to a very limited extent. Following this approach a final Panel decision would be administratively reviewable only with regard to those significant extraordinary issues which were within the sole discretion of the Authority, such as the correctness of an underlying negotiability determination [11] or matters which the Authority has clearly deemed it advisable to review.[12] In these circumstances the decision would be solely that of the Authority and the Administrative Law Judge would have authority to hear the matter only upon specific direction from the Authority. The Authority has not at this juncture ordered any such hearing and accordingly, under this theory I do not conclude I have any warrant to conduct a hearing on any issue presented by the Respondent.

A third approach could provide Respondent a right of administrative review of the Panel's decision wherein the special circumstances of the situation might give rise to the right of limited review. Such situation would be similar to that of the review accorded in an unfair labor practice case of a matter previously litigated in a representative proceeding under the National Labor Relations

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[11] See Section 7117(b) and (c) of the Statute and Part 2424 *et seq.* of the Regulations.

[12] See generally, e.g., Part 2428.3 of the Regulations which treats enforcement of Assistant Secretary standards of conduct decisions and orders and provides that upon filing with the Authority a petition to enforce, an Assistant Secretary's decision and order ". . . shall be enforced (by the Authority) unless it is arbitrary, capricious, or based upon manifest disregard of the law."

Act. The National Labor Relations Board has long held that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a refusal to bargain under the Act is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.

Respondent urges that the Board's approach be followed and argues that the matter set forth in the offer of proof falls within the scope of relitigable issues under the Board's rule. However, it is well settled under Board law that there is no right to review of an underlying determination of a prior administrative decision of the Board based upon the claim of facts which occurred after the Board's initial representation decision.[13] The following language of the court in *L.B. Foster, Co.* is particularly applicable:

> ". . . to deny enforcement, with or without remand for reconsideration on the basis of facts, occurring after the Board's decision, is to put a premium upon continued litigation by the employer; it can hope that the resulting delay will produce a new set of facts, as to which the Board must then readjudicate. Suppose that the Board does so, and again finds against the employer. There can then be a petition to this court, a decision by it, and a petition for certiorari to the Supreme Court. By that time there will almost surely be another new set of facts. When is the process to stop?"

Therefore, as I find no special circumstance which would require review of the Panel's Decision and Order,

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[13] Cf. *Ray Brooks v. N.L.R.B.*, 75 S. Ct. 176 (1954); *New Alaska Development Corp. v. N.L.R.B.*, 441 F.2d 491 (7th Cir 1971); *N.L.R.B. v. The Kostel Corporation d/b/a Big Ben Shoe Store*, 440 F.2d 347 (7th Cir. 1971); *N.L.R.B. v. L.B. Foster Co.*, 418 F.2d 347 (9th Cir. 1969); *Henderson Trumbull Supply Corp.*, 205 N.L.R.B. 245; *The Wackenhut Corp.*, 194 N.L.R.B. 302, enf'd 471 F.2d 761 (6th Cir. 1972).

I conclude that further review of the Panel's decision is unwarranted.[14] In my judgment, to inquire further into the soundness of the Panel's factual findings and legal conclusions or the procedures it employed in reaching its decision would inevitably result in opening inquiry into essentially a full review of the Panel's actions.

Lastly, a final Panel decision might be considered fully reviewable, as Respondent suggests, wherein the review would be tantamount to a hearing *de novo*. I reject this concept. To conclude otherwise would render a nullity the legislative history of the Statute as stated above, undermine the Panel's function and effectiveness and produce a stream of interminable litigation on matters which the Panel is uniquely designed to resolve in an expeditious fashion.

With regard to Respondent's argument that no finding of violation of Section 7116(a)(1) can be supported without specific proof of bad faith or intent to interfere with, restrain or coerce employees, Respondent's contentions are without merit.[15] Under Section 7102 of the Statute employees are assured the right to join, form and assist labor organizations and engage in collective bargaining through their chosen representatives. The Union herein, as the employees' collective bargaining representative, is seeking to conclude an agreement with Respondent re-

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[14] Even if Respondent's new evidence was admissable for the purpose of evaluating the Panel's prior decision, I would find the "evidence" contained in the offer of proof to be too insubstantial to vary the Panel's conclusions when considering the totality of the evidence the Panel reviewed in reaching its findings and conclusions.

[15] I do not conclude that the language contained in the House Report of July 31, 1978 (*Legislative History of the Federal Service Labor-Management Relations Statute*, fn. 8, at 700, 701), which states that "failure to comply with any action ordered by the Panel constitutes an unfair labor practice by an agency under section 7116(a)(6) and (7) . . .", excludes the possibility of finding such conduct to be violative of any other provision of the Statute.

garding conditions of employment. The statutory scheme envisions that when an impasse occurs Panel assistance will be sought and the decision of the Panel will be final and binding on the parties. Thus, the Panel becomes an integral part of the collective bargaining process. When a final decision of the Panel is defied and a union is frustrated in its attempt to enter into an agreement in the manner prescribed by the Statute, employees will readily conclude that significant fruits which flow from union representation are illusory and motivation for union membership and assistance is substantially diminished. Accordingly, when Respondent undermined this aspect of the collective bargaining process by rejecting the statutory procedure enacted to resolve impasse disputes, Respondent interfered with its employees rights granted by the Statute.

The claim that Respondent did not violate Section 7116 (a) (1) since it engaged in such conduct merely to obtain review of the Panel's Decision and Order is not persuasive. The Statute provides that the decision of the Panel is final and binding on the parties. Therefore, a party who refuses to follow the Panel's final decision does so at its peril. If Respondent ultimately prevails in its argument that it was not obligated to follow the Panel, then obviously there was no 7116(a)(1) violation of the Statute. However, if Respondent is incorrect, then the employees were illegally denied the benefit of a contractual provision until such time as Respondent complies with the Panel's Decision and Order. In these circumstances it becomes all too apparent to employees that since the full benefits of union representation can be illegally *delayed*, such benefits are substantially less than that which the Statute sought to provide in its declaration that Panel decisions would be *final* and *binding*.

Having found and concluded that by its failure and refusal to comply with a final Decision and Order of the Federal Service Impasses Panel Respondent violated Sec-

tions 7116(a)(6) and (1) of the Statute, I recommend that the Authority issue the following:

## ORDER

Pursuant to Section 7118(a)(7) of the Federal Labor-Management Relations Statute and Section 2423.29 of the Final Rules and Regulations, it is hereby ordered that Division of Military and Naval Affairs, State of New York, Albany, New York shall:

1. Cease and desist from:

(a) Refusing to honor and abide by the January 9, 1979, Decision and Order of the Federal Service Impasses Panel regarding "Wearing of the Military Uniform" or in any other manner failing or refusing to cooperate in impasse decisions or procedures.

(b) Refusing to adopt the following language in their collective bargaining agreement with the New York Council, Association of Civilian Technicians:

> Employees, while performing their day-to-day technician duties, shall have the option of wearing either the military uniform or an agreed-upon standard civilian attire without display of military rank, such cothing to be purchased by employees who choose to wear it.

(c) Refusing to agree upon and incorporate in their collective bargaining agreement with New York Council, Association of Civilian Technicians those circumstances and occasions for which the wearing of the military uniform may be required.

(d) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities in New York State copies of the attached notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Adjutant General, State of New York, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where Notices to Employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director of Region I, 441 Stuart Street, 8th Floor, Boston, Massachusetts 02116, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

/s/ Salvatore J. Arrigo
SALVATORE J. ARRIGO
Administrative Law Judge

Dated: April 9, 1980
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES

OF CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT

RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL honor and abide by the January 9, 1979, Decision and Order of the Federal Service Impasses Panel regarding "Wearing of the Military Uniform" and cooperate with impasse decisions and procedures.

WE WILL adopt the following language in our collective bargaining agreement with New York Council, Association of Civilian Technicians:

> Employees, while performing their day-to-day technician duties, shall have the option of wearing either military uniform or an agreed-upon civilian attire without display of military rank, such clothing to be purchased by employees who choose to wear it.

WE WILL agree upon and incorporate into our collective bargaining agreement with New York Council, Association of Civilian Technicians, those circumstances and occasions for which "wearing of the military uniform" may be required.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

_____

Activity

Date: _____ By: _____

Signature

This Notice must remain posted for 60 consecutive days from the date of posting and not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 8th Floor, Boston, Massachusetts 02116.

UNITED STATES OF AMERICA

BEFORE THE
FEDERAL SERVICE IMPASSES PANEL

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Case No. 78 FSIP 32

IN THE MATTER OF STATE OF NEW YORK
DIVISION OF MILITARY AND
NAVAL AFFAIRS

and

NEW YORK COUNCIL
ASSOCIATION OF CIVILIAN
TECHNICIANS, INC.

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## DECISION AND ORDER

The Federal Service Impasses Panel (Panel) issued a *Panel Report and Recommendations for Settlement* in this matter on September 28, 1978. The recommendations were as follows:

1. *Extension of the Contract*

The Employer should withdraw its proposal.

2. *Performance Ratings*

The parties should adopt the Union's proposal.

3. *Wearing of the Military Uniform*

a. The parties should adopt language in their agreement affording employees, while performing their day-to-day technician duties, the option of wearing either (a) the military uniform or (b) an agreed-upon standard civilian attire without dis-

playing military rank, such clothing to be purchased by employees who choose to wear it.

b. Parties should agree upon exceptions to cover those circumstances and occasions for which the wearing of the military uniform may be required.

The New York Council, Association of Civilian Technicians, (Union or ACT) accepted these recommendations but the State of New York, Division of Military and Naval Affairs (Employer) did not. In its written response the Employer requests that the Panel review its findings and adopt the Employer's proposals on all three issues at impasse. The Panel has now considered the entire record in this case including the responses of the parties to its report and recommendations.

With regard to the contract extension issue, the Employer argues that its proposal, unlike that of the Union, is consistent with a Federal Labor Relations Council (Council) decision which was intended to encourage bargaining on this subject.[1] As to the second issue, performance ratings, the Employer contends that military supervisors must be able to rate technicians on their day-to-day activities. The military commander, it asserts, is in the best position to assess the individual performance of the technicians.

We find that these arguments are essentially the same as those which we found to be unpersuasive in the *Panel Report and Recommendations for Settlement* in this case. With particular respect to the performance ratings issue, we recommended adoption of the Union's proposal that "all technician performance ratings will be accomplished in accordance with Technician Personnel Pamphlet 902" (TPP 902) be included in the contract. TPP 902 pro-

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[1] *Internal Revenue Service, Odgen Service Center, et al.*, A/SLMR No. 806, FLRC No. 77A-40, and *Department of the Treasury, Internal Revenue Service, Brookhaven Service Center*, A/SLMR No. 859, FLRC No. 77A-92 (March 17, 1978), Report No. 147.

vides, as we previously noted, that performance appraisals may be solicited by civilian supervisors, from military commanders to aid in the rating of technicians, This procedure, in our view, should substantially satisfy the Employer's needs.

As to the uniform issue, the Employer argues that the Adjutant General (Chief of Staff to the Governor of New York), pursuant to statutory authority, has required the wearing of the military uniform; his decision was based on the military character of the National Guard and the successful accomplishment of its military tasks and mission. The Panel's recommendations, it contends, "enervates" the Adjutant General's "final, military authority." Implicit in this argument is that, with a decision by the Adjutant General requiring the wearing of the military uniform, there is nothing to bargain about. We note, however, that the Federal Labor Relations Council previously determined that the wearing of the military uniform by National Guard technicians is a negotiable matter.[2] Its decision is controlling;[3] therefore, the Panel, as an agency within the Council, has the

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[2] *National Association of Government Employees, Local R14-87 and Kansas National Guard,* FLRC No. 76A-16 (and other cases consolidated therewith) (January 19, 1977), Report No. 120; and *National Federation of Federal Employees, Local 1636, and State of New Mexico National Guard,* FLRC No. 76A-75 (and other cases consolidated therewith) (January 19, 1977), Report No. 120; requests for reconsideration denied (May 18, 1977), Report No. 125.

[3] Section 4 of the Order provides in relevant part: . . .

> (a) There is hereby established the Federal Labor Relations Council . . . .
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> . . . . . .
>
> (b) The Council shall administer and interpret this Order, decide major policy issues, prescribe regulations, and from time to time, report and make recommendations to the President.
>
> . . . . . .

duty to resolve the impasse which has arisen in negotiations on this issue.[4]

The Employer also argues that the Panel (1) disregarded congressional intent; (2) failed to consider evidence regarding the experience of the Air National Guard technicians; (3) did not give appropriate weight to the greater responsibilities of National Guard technicians under the "total force" concept; and (4) incorrectly found that National Guard technicians perform duties similar to reserve technicians and other civilian employees of the Department of Defense.

With respect to congressional intent, the Council considered a similar claim in the previously cited negotiability case concerning the wearing of the military uniform and stated that;[5]

> . . . [N]othing in the National Guard Technician Act of 1968 or in its extensive legislative history indicates that it was the intent of Congress to establish a dress requirement for National Guard technicians during the time these technicians were performing in their technician status.

Contrary to the Employer's second assertion, evidence as to the wearing of the military uniform by Air National Guard technicians was, in fact, reviewed by the

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[4] Section 5 of the Order provides in pertinent part: . . .

(a) There is hereby estblished the Federal Service Impasses Panel as an agency within the Council. The Panel consists of at least three members appointed by the President, one of whom he designates as chairman. The Council shall provide the services and staff assistance needed by the Panel.

(b) The Panel may consider negotiation impasses as provided in section 17 of this Order and may take any action it considers necessary to settle an impasse.

. . . . . .

[5] See note 2, *supra* at 18 of *Kansas National Guard.*

Panel and appears on page 9 of its recommendations in this case.

As to the Employer's third and fourth allegations, we find that these claims are essentially the same as those found to be unpersuasive in the aforementioned *Panal Report and Recommendations for Settlement.*

Consequently, we conclude, consistent with our responsibilities under sections 5 and 17 of Executive Order 11491, as amended, that the Employer's request should be denied and the impasse be resolved on the basis of our prior recommendations. THEREFORE, we issue the following order.

ORDER

Pursuant to the authority vested in it by Executive Order 11491, as amended, the Federal Service Impasses Panel hereby orders that:

1. *Extension of the Contract.*

The Employer shall withdraw its proposal.

2. *Performance Ratings*

The parties shall adopt the Union's proposal.

3. *Wearing of the Military Uniform*

a. The parties shall adopt the following language in their agreement:

> Employees, while performing their day-to-day technician duties, shall have the option of wearing either the military uniform of an agreed-upon standard civilian attire without display of military rank, such clothing to be purchased by employees who choose to wear it.

b. Circumstances and occasions for which the wearing of the military uniform may be required shall be agreed upon by the parties and incorporated in their agreement.

By direction of the Panel.

/s/ Howard W. Solomon
HOWARD W. SOLOMON
Executive Secretary

January 9, 1979
Washington, D.C.

UNITED STATES OF AMERICA

BEFORE THE
FEDERAL SERVICE IMPASSES PANEL

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Case No. 78 FSIP 32

IN THE MATTER OF

STATE OF NEW YORK
DIVISION OF MILITARY AND NAVAL AFFAIRS
ALBANY, NEW YORK

and

NEW YORK COUNCIL
ASSOCIATION OF CIVILIAN TECHNICIANS, INC.

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# PANEL REPORT AND RECOMMENDATIONS FOR SETTLEMENT

*Appearances:*

*For State of New York, Division of Military and Naval Affairs:*

C. Roger Lunden, Counsel
Division of Military and Naval Affairs
Albany, New York

*For New York Council, Association of Civilian Technicians, Inc.:*

Vincent J. Paterno, President
Association of Civilian Technicians, Inc.
Rockville, Maryland

John Chapman, Executive Assistant
Association of Civilian Technicians, Inc.
Rockville, Maryland

The New York Council, Association of Civilian Technicians, Inc. (Union), filed a request with the Federal Service Impasses Panel (Panel) on March 27, 1978, to consider a negotiation impasse under section 17 of Executive Order 11491, as amended (Order). The request arose out of labor agreement negotiations between the Union and the State of New York, Division of Military and Naval Affairs (Employer).

On May 2, 1978, the Panel determined that resolution of the impasse required factfinding. By letter and Notice of Hearing, it appointed Jonathan E. Kaufmann to conduct a factfinding hearing on issues concerning the wearing of the military uniform, the extension of the contract, reopening of the contract, and performance ratings.

During the course of the prehearing conference held on June 6, 1978, the parties were able to resolve the reopener issue. Thereafter, a hearing was held before Factfinder Kaufmann on June 7 and 8, 1978, concerning the three remaining issues. A stenographic record was taken, testimony and argument were presented, and the parties also presented documentary evidence. Posthearing briefs were subsequently filed by both parties.

## BACKGROUND

### 1. *The Employer and the Union*

The mission of the Employer is to provide units of trained, qualified, and equipped personnel for mobilization in time of war, national emergency, or civil disruption. Authority to administer the technician program pursuant to the National Guard Technician Act of 1968, 32 U.S.C. § 709 (1970), is granted to the Adjutant General; in the State of New York the Adjutant General is the Chief of Staff to the Governor (CSG). This program includes 1,317 Army National Guard technicians employed in 84 locations throughout New York in such job classifications as general mechanic, administrative supply

technician (AST), and fabric worker. In addition, there are 1,043 Air technicians at 8 facilities in such positions as supply electronics mechanic, sheet metal mechanic, and supply technician.

The union gained recognition on May 26, 1970, as exclusive representative for a statewide bargaining unit of about 2,000 Army and Air National Guard technicians. Since then it has negotiated one collective bargaining agreement with the Employer which expired in October 1977.

2. *The History of the Current Negotiations*

Prior to the expiration of the contract, the parties unsuccessfully attempted to negotiate a ground rules agreement for upcoming negotiations. Substantive negotiations began nevertheless on November 14, 1977. After a week, agreement was reached on such issues as union representation, hours of work, and leave. A Federal mediator met with the parties on two occasions in December 1977 and April 1978 but the unresolved issues led to the Union's request for Panel assistance.

## THE ISSUES AT IMPASSE

The issues will be addressed in the order that they were presented at the hearing: (1) The extension of the contract; (2) performance ratings; and (3) the wearing of the military uniform.

## EXTENSION OF THE CONTRACT

This issue involves whether the contract will be extended beyond the termination date if the parties are still negotiating for a new agreement at that time.

1. *Background*

Negotiations for the parties' only contract began in 1971 and concluded in 1975 although no negotiations

took place for about a year and one-half. The final agreement contained no language concerning its extension but the Employer agreed to extend the dues withholding and grievance procedure provisions after the contract terminated in October 1977.

2. *The Parties' Proposals*

The Union presented no proposal for the Panel's consideration. Employer's proposal is as follows:

> This agreement, together with all articles contained herein, shall terminate on the expiration date of said agreement and may be extended only with the consent of the Chief of Staff to the Governor. (Emp. Exh. 1.)

3. *The Union's Position*

During the course of the current negotiations, the Union was concerned that the contract remain in effect until a new agreement was implemented. These concerns were met, it claims, when the Federal Labor Relations Council (Council) issued a March 17, 1978, decision providing for the continuation of contract terms as conditions of employment after an agreement expires.[1] The Union contends that the Employer's proposal attempts to set aside the Council's decision even though management still retains the right to invoke changes that derive from law, regulation, or policy. With regard to the Employer's claim that termination of the contract is necessary to spur bargaining, a Union witness testified that the Union has always negotiated expeditiously. It also argues that termination of a contract would put no pressure on the Employer to negotiate.

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[1] *Internal Revenue Service, Odgen Service Center, et al.*, A/SLMR No. 806, FLRC No. 77A-40, and *Department of the Treasury, Internal Revenue Service, Brookhaven Service Center*, A/SLMR No. 859, FLRC No. 77A-92 (March 17, 1978), Report No. 147.

4. *The Employer's Position*

The Employer argues that the Council, in the previously discussed decision, did not intend that the existing working conditions continue unabated, a situation which would create inertia in the collective bargaining process. It points to this part of the Council's decision: [2]

> In our view, existing personnel policies and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, continue as established upon the expiration of a negotiated agreement, absent an express agreement by the parties that such personnel policies and practices and matters affecting working conditions terminate upon the expiration of that agreement or unless otherwise modified in a manner consistent with the Order.
>
> (Un. Exh. 1 at 7.)

This language, it asserts, indicates that the Council wants the parties to negotiate over the extension but the Union steadfastly refuses to move from its current position. The Employer notes that its position is flexible and it would consider appropriate a recommendation of a 30- or 60-day extension of the agreement. Absent some language concerning termination, the Employer argues, the Union will receive all the benefits of the Council decision and will be under no pressure to negotiate prior to the expiration date of the contract.

## PERFORMANCE RATING

At issue is whether military personnel should be permitted to rate technicians on their day-to-day technician performance.

1. *Background*

Army and Air National Guard technicians receive performance ratings from their supervisors that reflect how

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[2] *Id.* at 7.

well they accomplish their normal, day-to-day duties. The Technician Personnel Pamphlet (TPP) 902, issued by the National Guard Bureau, establishes procedures for assigning these performance ratings. TPP 902.2-3(a) states in pertinent part:

> 2-3. *Annual performance rating.* a. This is the annual process through which an official record of a technician's performance and assigned duties is made. These ratings are based on comparisons with performance requirements and are made for the purpose of providing the technician, the technician's supervisor, and the TPO with an official record of the technician's performance for the rating period. Official ratings will be assigned by the immediate supervisor and approved by the next higher level supervisor. Solicitation of performance appraisals by unit commanders not in the technician program is recommended to aid supervisors in rating those technicians whose duty station is not in the same geographic area as the supervisor. (Un. Exh. 2 at 5.)

Both parties agree that the procedures contained in TPP 902 have been followed in the past. To date the technician's civilian rather than military supervisor has prepared the performance rating of the technician's day-to-day activities.

2. *The Parties' Proposals*

The Union proposes that:

> All technician performance ratings will be accomplished in accordance with Technician Personnel Pamphlet 902, dated September 30, 1975. (Un. Exh. 4.)

The proposal of the Employer is as follows:

> Annual technician performance ratings and related evaluations will be conducted by designated

personnel utilizing lines of authority and responsibility. Personnel designated as raters may be selected from the federal technician force, state military personnel in designated areas of interest, or military commanders with responsibility for the actions of technicians.
(Emp. Exh. 5.)

3. *The Union's Position*

Performance ratings, the Union argues, have a direct impact on an employee's advancement to higher level positions. It is important, therefore, that the rating official be trained to evaluate and understand Federal performance standards, and be familiar with the work of other technicians in similar positions. Thus, the Union proposes a continuation of the past practice in which civilian supervisors have always given the performance ratings for the technicians' day-to-day tasks. TPP 902, it notes, provides that performance appraisals may be solicited from military commanders to aid the technician supervisor in rating a particular employee.[3] Over the years, there has been constructive input from the commanders, the Union asserts. The Employer's proposal goes further, it contends, since military supervisors would be permitted to be completely responsible for the ratings. Several Union witnesses testified that: Their military commanders are often part-time members of the Guard with civilian jobs outside the installation; these commanders would have little basis for evaluation since they only observe technicians performing military tasks that are quite different from their day-to-day activities; and civilian supervisors receive civil service training not offered to their military counterparts.

Furthermore, TPP 902 provides a procedure for technicians to appeal their performance ratings to the Civil

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[3] See p. 5, *supra*.

Service Commission.[4] The Union believes that these rights would be waived if technicians received their technician performance ratings solely from military supervisors who are not considered employees under Title 5 of the United States Code. The Employer offers its proposal, the Union avers, so that technicians will be unable to file grievances over the status of the supervisors who author their performance ratings.

4. *The Employer's Position*

The heart of this issue, the Employer claims, is whether military personnel may rate New York National Guard technicians on their performance of day-to-day duties. It asserts that Agency issuances support its contention that military personnel may conduct such performance appraisals. In this regard, TPP 902.1-4 states in pertinent part:

> b. *Adjutant General.* The Adjutant General concerned will establish responsibility within the State for the proper operating and administration of the State Plan.
>
> . . . . . .
>
> c. *Supervisor.* For the purpose of this pamphlet, a supervisor is the person (Federal or State official) who is immediately responsible for the day-to-day work of the technician; that is, the first person in

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[4] TPP 902.2-6(b) states in pertinent part:

> b. *Statutory Board of Review (SBR).* The Adjutant General will establish an SBR for reviewing appeals of performance ratings in accordance with subchapter 3, chapter 430 of the FPM. The chairman will be designated by the Civil Service Commission. The designation of a technician member, in accordance with paragraph 3-2d(2), chapter 430 of the FPM will be on an ad hoc basis as stipulated by the appellant. The Adjutant General and appellant may designate representatives to participate in board proceedings.
> (Un. Exh. 2 at 7).

authority who assigns, reviews, and checks the work of the technician.

. . . . . .

(Un. Exh. 2 at 3-4.)

The Employer notes that the CSG has broad authority to determine which supervisors should rate employees. For instance, it asserts that technicians, such as AST's, are "responsible to" and "work under" the unit commander, a military supervisor. Technician Information Bulletin No. 76-3 also states, in part, that:

> . . . [I]t is the policy of the National Guard Bureau that each State should designate in writing the responsible official (military commander or technician) responsible for rating or supervision of technicians.
> (Emp. Exh. 3.)

The military commanders already have input into the rating process, the Employer maintains, noting that military supervisors rate a technician's military performance for reduction-in-force purposes under Technician Personnel Manual (TPM) 351.[5] Since reduction-in-force

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[5] TPM 351.5(e) states in pertinent part:

> e. *Relative retention standing.*
>
> . . . . . .
>
> The retention rating is determined by the combined cumulative totals of the annual Technician Performance Rating NGB Form 2, prepared in accordance with TPP 902 and the Appraisal By Immediate Military Supervisor—Reduction In Force, NGB Form 351-2, prepared at the same time and in accordance with the instructions on the NGB Form 351.2 (figure 5-1). Military appraisals will be completed at the time of a RIF only for those technicians who do not have a current military appraisal in their official personnel folders. The weighted value of the annual Technician Performance Rating will be as follows: satisfatory, 25 points; excellent, 50 points; outstanding, 75 points.
> (Emp. Exh. 2.)

ratings can affect a technician's job status and reemployment rights, the military commander influences the technician's civilian position, the Employer argues. Yet absent direct responsibility for the technician rating system the commander has no means of addressing specific technician shortcomings.

Its proposal should be adopted, the Employer claims, to avoid further litigation such as employee grievances arising from the rating of technicians' regular duties by military commanders. Moreover, its proposal is sensible, the Employer maintains, because some technicians have more contact with their military commanders than with their civilian supervisors and in such instances military personnel are better able to rate the technician.

## WEARING OF THE MILITARY UNIFORM

The issue is whether New York National Guard technicians should be required to wear the military uniform or permitted to wear civilian clothing when performing technician duties.

### 1. *The Status of National Guard Technicians*

The Council has described the status of National Guard technicians as follows:[6]

> National Guard technicians are employed pursuant to the National Guard Technician Act of 1968 in full-time, civilian positions to administer and train the National Guard and to maintain and repair the supplies issued to the National Guard or

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[6] *National Association of Government Employees, Local No. R14-87 and Kansas National Guard,* FLRC No. 76A-16 (and other cases consolidated therewith) (January 19, 1977), Report No. 120; and *National Federation of Federal Employees, Local 1636 and State of New Mexico National Guard,* FLRC No. 76A-75 (and other cases consolidated therewith) (January 19, 1977), Report No. 120, request for reconsideration denied (May 18, 1977), Report No. 125.

> the armed forces. Such technicians must, as a condition of their *civilian employment under the Act*, become and remain *members of the National Guard* (i.e., in a military capacity) pursuant to 32 U.S.C. § 709(b) and (e). As a result, these technician positions are excepted from the competitive service under 32 U.S.C. § 709(d). As members of the National Guard, technicians are required to perform *military* duties to the same extent as other civilians who are members of the Guard, i.e., they are required to attend four unit training assemblies per month, each four hours [in] duration, and to attend a National Guard encampment during a period of fifteen days each year. Additionally, all members of the National Guard, whether or not they happen to be also employed as technicians under the Act, are subject to be called into active service. [Emphasis in original; footnotes omitted.]
> (Un. Exh. 19 at 2-3.)

2. *Past Practice and Bargaining History*

The record reflects that Air technicians in New York have always worn the military uniform while accomplishing their day-to-day tasks. There was undisputed testimony, however, that many Army technicians wore various types of civilian attire from 1950 to 1972.

In March 1971 the parties began negotiations for their first agreement. The Employer proposed that all technicians wear the military uniform while the Union sought the elimination of the uniform-wearing requirement entirely. With negotiations still in process, the CSG issued a directive requiring that all technicians wear the military uniform.

On September 27, 1972, the National Guard Bureau found the Union's proposal to be nonnegotiable and the parties' first agreement did not contain any specific language regarding the wearing of the military uniform.

3. *The Parties' Proposals*

At the hearing, the Union offered for the first time the following proposal:

> 1. Excepted employees of the New York Air and Army National Guard, covered by this agreement, shall, while performing their day-to-day technician duties, have the day-to-day option of wearing either the:
>
> a. Military uniform.
>
> b. An agreed upon standard of civilian attire without display of military rank, such clothing to be provided by the employees.
>
> 2. The following circumstances and occasions for which the wearing of the military uniform may be required are:
>
> a. When a technician leaves his or her place of employment for the sole purpose of recruiting, the Union agrees that the military uniform is appropriate attire.
>
> b. Civil/ceremonial events which are agreed to by the Union on the basis of prior notification.
>
> c. Security police whose major technician function is covered by a job description so related.
>
> d. Security augmentees while performing security duties as separate from their technician assignment.
>
> e. Air crews while in flight status.
>
> 3. Standard of civilian attire as referred to in para. 1b is:
>
> a. Administrative personnel while performing such duties, if the civilian attire is opted, shall wear dark pants and light shirts. Jackets or sweaters shall be of complementary colors. Ties shall be worn based

upon Civil Service Commission standards, which are published as seasons change, which are complementary to the attire. Female technicians may wear slacks or skirts.

b. Maintenance personnel will wear dark pants and a lighter shirt or a dark coverall. Outer garments shall be of a complementary color. Hats, if opted for wear by personnel, shall be of dark color, baseball type, or wool knit.

4. The Employer shall agree to continue to provide safety and environmental equipment.
(Un. Exh. 5.)

The Employer proposes the following:

Technicians in the excepted service will wear the military uniform appropriate to their service and federally recognized grade when performing technician duties. Technicians will comply with the standards of the services pertaining to grooming, customs and wearing the military uniform in accordance with AR 600-20, AR 670-5, AR 670-30 and AFR 35-10, AFR 30-01 except:

a. In an official travel status, traveling by commercial or private transportation.

b. Technicians who are labor organization representatives while engaged in labor agreement negotiations.

c. Technicians attending courses of instruction in a technician status at locations other than military installations.

d. Technicians while participating as data collectors during the conduct of Federal Wage System Surveys.
(Emp. Exh. 9.)

4. *The Union's Position*

The Union contends that technicians are civilian employees when performing their day-to-day activities. While in this status they are not covered by the military code of justice or subject to military discipline. Accordingly, it argues, they should not be required to wear the military uniform, giving the impression that they are in a military status.

The Employer's arguments that the military uniform must be worn to preserve discipline and further its mission are similar to those heard by the Council and the Panel in previous cases, the Union avers. The only unique aspect of the New York National Guard, it claims, is the fact that most Army technicians wore civilian attire from 1950 until 1972; furthermore, the technicians' performance did not suffer during this period. The Union asserts that its proposal of standard civilian attire also provides for circumstances when the military uniform would be required, i.e., recruiting, security, etc. It claims that similar language has been agreed to by the National Guard in Massachusetts, Montana, Illinois, and Michigan.

There was also testimony concerning problems resulting from the uniform-wearing requirement: Technicians are harassed by regular military personnel; military grooming standards are applied to employees in technician status; military commanders direct technicians in civilian status without going through the technician's civilian supervisor; and when visiting other installations, technicians are forced to accept quarters according to their military rank even though their technician status warrants superior accommodations during such travel.

The National Guard technicians' duties, the Union notes, are analogous to those tasks performed by Reserve technicians who are not required to wear the military uniform. It argues that civilian employees in the Department of Defense also are engaged in similar activities to

further the military mission of the Armed Forces. An Air technician testified that discontent occurred in his unit because of its close working relationship with technicians from another State who were not wearing the military uniform in the 1960's.

5. *The Employer's Position*

The Employer proposes a continuation of the current practice requiring that technicians wear the military uniform. Under the National Guard Technicians Act, the Employer notes, technicians are employed in full-time, civilian positions to further the mission of the National Guard. As a condition of employment, it argues, all technicians are advised that they must become and remain members of the National Guard; as such, they are subject to being called into active service. Under the aforementioned Act, the CSG has the authority to determine whether or not the uniform must be worn, the Employer avers.

One of its witnesses testified that in 1970, following the establishment of the "total force" policy, the National Guard became an important component in the Nation's frontline defense.[7] Accordingly, an aspect of the New York Air National Guard's mission is to provide continuing air support for operations in the Greenland area; some units must be prepared to respond within minutes. This mission is unique, the Employer claims, because no other National Guard unit has responsibility for deployment on military operations outside of the United States. Given the constant threat of international conflict, it is

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[7] In support of its position, the Employer cites Major General Francis S. Greenlief's statement regarding the importance of wearing the military uniform which was made at a hearing before the Panel in *Montana National Guard, Helena, Montana and Montana Air/Army Chapters, Association of Civilian Technicians, Inc.* (Case No. 77 FSIP 22, January 19, 1978), Panel Release No. 90 (Emp. Exh. 7; Emp. Br. 19-20).

vitally important, the Employer asserts, that the technician be prepared to respond at any time.

An Employer witness testified that discipline, a necessity in time of war, is developed by wearing the military uniform; an erosion of discipline will occur if the uniform is worn only occasionally. Furthermore, wearing the uniform, he noted, helps the technician to be ready on short notice.

Since Reserve technicians and Department of Defense employees are not required to be members of th National Guard as a condition of employment, the Employer argues that their circumstances are not comparable to bargaining unit technicians. Moreover, it asserts that the Reserves are not as involved as the Guard in the frontline defense of the Nation.

The Employer is aware that the Panel has considered impasses from other States involving this issue but claims that two factors—the need for discipline and its unique military responsibilities—distinguish this case from the others. For these reasons it asks the Panel to recommend that technicians continue to wear the military uniform while performing their day-to-day activities.

## DISCUSSION

With regard to the first issue, the Council concludes that existing personnel policies and practices and matters affecting working conditions established under the contract continue after the contract expires,[8] absent an express agreement by the parties that they terminate or unless otherwise modified in a manner consistent with the Order. Part of the Council's reasoning was as follows:[9]

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[8] See n. 1.

[9] *Id.* at 7-8.

> Such conclusion implements the recognized policy of the Order to foster stability in the Federal labor-management relations program. Further, it is consistent with the established framework of the Order which constricts unilateral changes in current personnel policies and practices and matters affecting working conditions and which provides for the peaceful resolution of bargaining disputes. Finally, our conclusion as to the continuation of established personnel policies and practices and matters affecting working conditions may be readily applied by the parties and facilitates "the maintenance of constructive and cooperative relationships between labor organizations and management officials," which is an underlying objective of the Order. [Footnotes omitted.]
> (Un. Exh. 1 at 7-8.)

While the Employer wants us to recommend that the provisions of the new agreement should terminate at its date of expiration, its proposal is not justified by the record in this case. Although such language would put additional pressure on the Union to bargain and perhaps lead to shorter negotiations, there is no evidence that the Union alone was responsible for the long delays in the last round of bargaining. Further, current negotiations have been moving at a much faster pace with no indication that either party has been foot-dragging. Adoption of the Employer's proposal under these circumstances would, in our view, create problems that the Council decision sought to eliminate, i.e., instability in the bargaining relationship and lower morale in the technician work force. For the above reasons we believe that the parties are better served if the new agreement remains silent with respect to the termination of any of its provisions upon the expiration of the contract. We note in this regard that even without the language sought by the Employer, management retains the right, as stated

by the Council,[10] to institute changes in accordance with sections 11(b) and 12(b) of the Order once the agreement expires. Furthermore, the Employer is obliged to adhere to the established personnel policies and practices and matters affecting working conditions only to the "maximum extent possible," that is, "to the extent consistent with the necessary functioning of the agency." Therefore, in view of all of these considerations and the particular facts in this case, we recommend that the Employer withdraw its proposal.

As to the second issue, the Employer, in effect, is requesting that the Panel render an interpretation of disputed language in TPP 902 merely to avoid the filing of grievances. It offers insufficient reasons, however, for having the Panel clarify the Agency's own regulations in a manner that would explicitly establish a new practice—technician performance ratings being given by the military rather than civilian supervisors. The Union's proposal, on the other hand, would incorporate TPP 902 into the contract with disagreements over its meaning being resolved under the grievance procedure. This, we find, is a more appropriate method of resolving such disputes.

The Employer also asserts that in certain circumstances military supervisors should be permitted to rate those technicians who have little civilian supervision and are performing poorly. On its face, TPP 902.2-3(a) already meets this concern since it provides that civilian supervisors may solicit performance appraisals from unit commanders not in the technician program.[11] Accordingly, we recommend that the Union's proposal be adopted.

An important part of the third issue, wearing of the military uniform, is whether the technician's role is fun-

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[10] *Id.* at 9.

[11] See p. 5, *supra*.

damentally military or civilian during the regular workweek. We discussed the status of technicians in the *Montana National Guard* case: [12]

> At the outset, we note that section 8 of the National Guard Technician Act of 1968 provides that the basic rates of pay for technicians shall be those established in the General Schedule and prevailing rates schedules described in title 5 of the United States Code (U.S.C.). These schedules are also applicable to civilian employees such as those working for the Department of Defense. Furthermore, an-

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[12] *Montana National Guard, Helena, Montana and Montana Air/Army Chapters, Association of Civilian Technicians, Inc.*, Case No. 77 FSIP 22 (January 19, 1978), Panel Release No. 90. See also *Massachusetts Air National Guard, 102d Tactical Fighter Intercepter Wing, Otis Air Force Base, Falmouth, Massachusetts and Local 3004, American Federation of Government Employees, AFL-CIO*, Case No. 77 FSIP 18 (December 28, 1977), Panel Release No. 87; *Michigan Air National Guard, Lansing, Michigan and Michigan State Council, Association of Civilian Technicians, Inc.*, Case No. 77 FSIP 33 (January 20, 1978), Panel Release No. 94; *State of New Jersey, Department of Defense, Trenton, New Jersey and Local 371, National Army-Air Technicians Association, IUE-AFL-CIO*, Case No. 77 FSIP 32 (January 27, 1978), Panel Release No. 95; *State of New Jersey, Department of Defense, Trenton, New Jersey and Local 3486, American Federation of Government Employees, AFL-CIO*, Case No. 77 FSIP 47 (Januar 27, 1978), Panel Release No. 95; *Kansas Army National Guard, Topeka, Kansas and Local R14-87, National Association of Government Employees*, Case No. 77 FSIP 30 (February 15, 1978), Panel Release No. 93; *South Carolina National Guard, Columbia, South Carolina and Local 1623, National Federation of Federal Employees*, Case No. 77 FSIP 26 (March 10, 1978), Panel Release No. 96; *Ohio Air National Guard, Worthington, Ohio and Council 127, American Federation of Government Employees, AFL-CIO*, Case No. 77 FSIP 36 (March 31, 1978), Panel Release No. 99; *Pennsylvania National Guard, Annville, Pennsylvania and Pennsylvania State Council, Association of Civilian Technicians, Inc.*, Case No. 77 FSIP 29 (June 20, 1978), Panel Release No. 101; *Minnesota Air National Guard, St. Paul, Minnesota and Local 2999, American Federation of Government Employees, AFL-CIO*, Case No. 77 FSIP 37 (July 6, 1978), Panel Release No. 102.

nual leave, sick leave, and job classifications for these employees are administered in accordance with sections 6303, 6307, and 5101 of title 5. We also note that, according to a Technician Personnel Pamphlet published by the National Guard Bureau, technicians' conduct is governed by Civil Service Commission regulations rather than by the Uniform Code of Military Justice, and that matters such as classification appeals may be filed with the Civil Service Commission. Further, title 32 of the U.S.C. provides that technicians are entitled to hospitalization benefits granted to members of the regular armed forces only when performing required drills and exercises, or when attending military schools or small arms competitions. Additionally, the Federal Labor Relations Council addressed this very issue in the context of considering whether there was a compelling need for the relevant National Guard Bureau regulation to bar negotiations over the subject matter in this case. In its opinion the Council stated that National Guard technicians are employed in full-time, civilian positions and that they are required to perform military duties only to the extent required of other civilians who are members of the Guard. The Council also found it significant, as we do, that the Union's proposal was specifically limited to those situations in which technicians are performing their normal, day-to-day duties in a civilian status. [Footnotes omitted.]

Although the Employer claims that technicians are unique because they must, as a condition of employment, maintain membership in the National Guard, we find nothing in the record to demonstrate that the technicians' tasks have a significantly greater military purpose than reservists and civilian employees in the Department of Defense. Furthermore, Army National Guard technicians in New York have had a long history of wearing various

types of civilian attire without any showing of adverse effect on their work performance.

The Employer contends that the need for discipline and its unique military responsibilities are two factors distinguishing New York from other National Guard cases previously considered by the Panel. With respect to the first matter, the Employer failed to demonstrate that a significant link existed between discipline in time of war and wearing the military uniform while performing technician duties. The second matter goes to the ability of technicians to be ready on short notice to respond to national emergencies. The record is devoid, however, of evidence that even the Guardsmen who work at civilian jobs away from the military installations (as compared to technicians at the National Guard facilities) have any particular difficulty in responding to emergency call-ups. If, as we shall recommend herein, technicians are allowed to wear standard civilian attire, the parties could negotiate over procedures for making certain that military uniforms are readily available for emergency situations.

In view of the foregoing considerations and our examination of the record, we conclude that the appropriate basis for settling this issue is to permit bargaining unit employees, when working in a technician status, the option of wearing either the military uniform or a standard civilian attire, without display of rank. The specific type of civilian dress should be determined through further discussions but its cost should be borne by those technicians who choose to wear it.

Although the Union's proposal contains circumstances in which the wearing of the military uniform by technicians during the performance of their day-to-day duties should be required, there have been no serious negotiations on this aspect of the dispute. Therefore, this matter, along with other details relating to the wearing of the uniform or its civilian alternative, should be resolved

by the parties through further negotiations in accordance with the recommendations on this issue which follow. We stress, however, the importance of having technicians wear standard civilian attire on those occasions when the military uniform is not worn.

## RECOMMENDATIONS

We, therefore, make the following settlement recommendations:

1. *Extension of the Contract*
   The Employer should withdraw its proposal.

2. *Performance Rating*
   The parties should adopt the Union's proposal.

3. *Wearing of the Military Uniform*

a. The parties should adopt language in their agreement affording employees, while performing their day-to-day technician duties, the option of wearing either (a) the military uniform or (b) an agreed-upon standard civilian attire without display of military rank, such clothing to be purchased by employees who choose to wear it.

b. The parties should agree upon exceptions to cover those circumstances and occasions for which the wearing of the military uniform may be required.

By direction of the Panel.

/s/ Howard W. Solomon
HOWARD W. SOLOMON
Executive Secretary

September 28, 1978
Washington, D.C.

## STATUTORY PROVISIONS

### CIVIL SERVICE REFORM ACT OF 1978

**§ 7103. Definitions; application**

(a) For the purpose of this chapter—

* * * *

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

* * * *

**§ 7106. Management rights**

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

**§ 7118. Prevention of unfair labor practices**

(a) (1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4) (A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period.

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged un-

fair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

## THE NATIONAL GUARD TECHNICIAN ACT

The National Guard Technician Act, 32 U.S.C. 709, provides:

> (a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in—
>
> > (1) the administration and training of the National Guard; and
> >
> > (2) the maintenance and repair of supplies issued to the National Guard or the armed forces.
>
> (b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.
>
> (c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.
>
> (d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.
>
> (e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) A right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

(f) Sections 2108, 3502, 7511, and 7512 of title 5 do not apply to any person employed under this section.

(g) (1) Notwithstanding sections 5544(a) and 6101 (a) of title 5 or any other provision of law, the Secretary concerned may, in the case of technicians assigned to perform operational duties at air defense sites—

(A) prescribed the hours of duties;

(B) fix the rates of basic compensation; and

(C) fix the rates of additional compensation; to reflect unusual tours of duty, irregular additional duty, and work on days that are ordinarily nonworkdays. Additional compensation under this subsection may be fixed on an annual basis and is determined as an appropriate percentage, not in excess of 12 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 of the General Schedule under section 5332 of title 5.

(2) Notwithstanding sections 5544(a) and 5101 (a) of title 5 or any other provision of law, the Secretary concerned may, for technicians other than those described in clause (1) of this subsection, prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(h) In no event shall the number of technicians employed under this section at any one time exceed 53,100.